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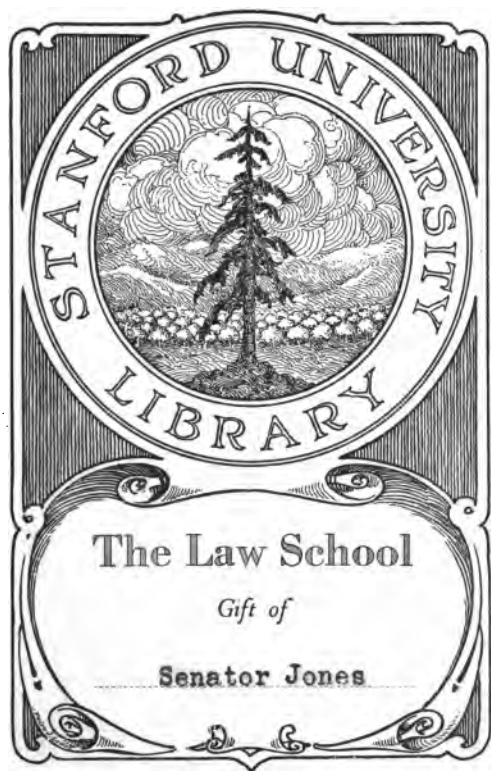
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CASES ON MORTGAGES.—I.

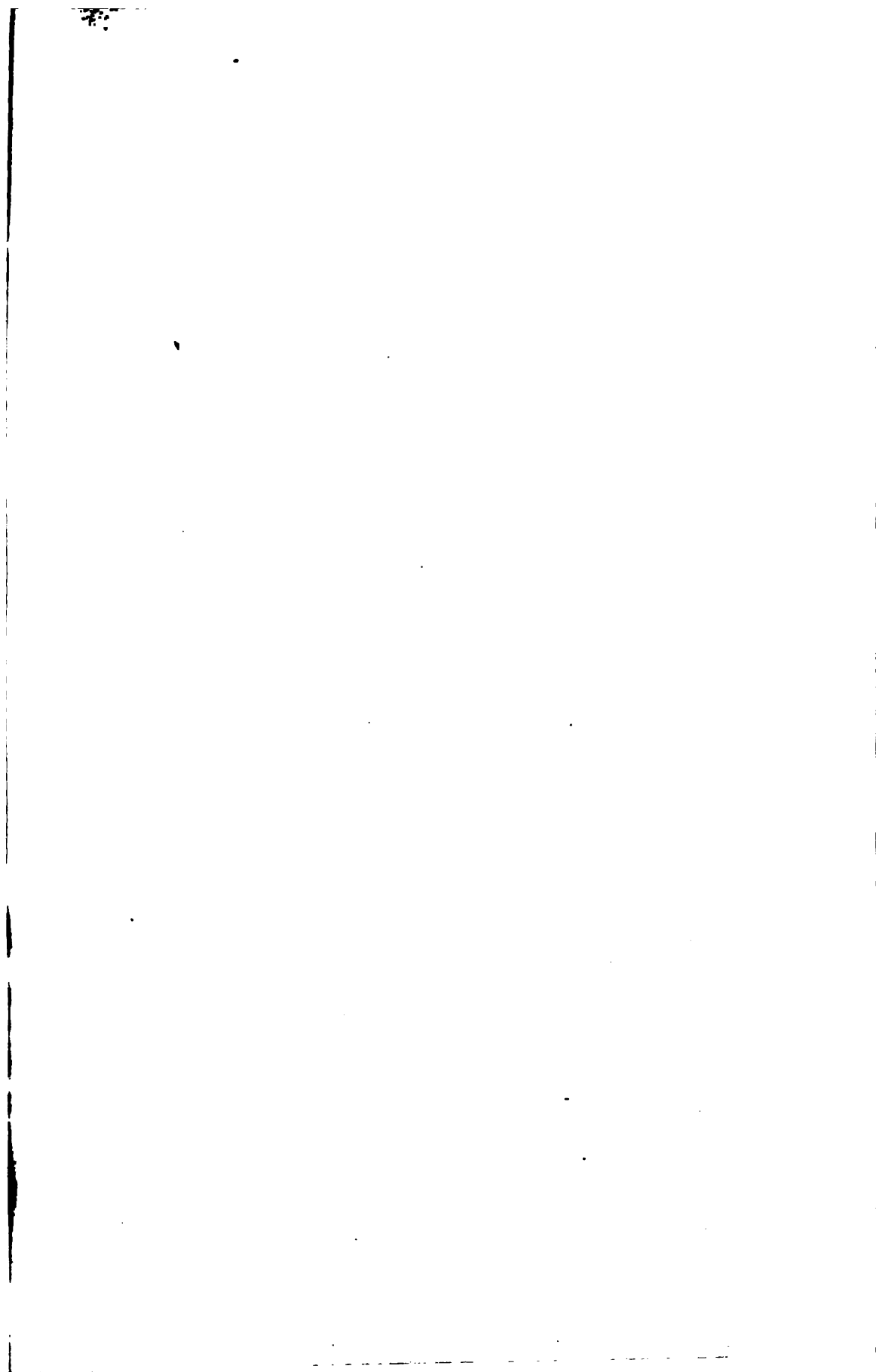
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CASES ON MORTGAGES.

PART I.

NATURE OF THE MORTGAGE.

CHAPTER I.

CONCEPTION OF MORTGAGE.

DIVISION I. — MORTGAGE IN FORM.

SECTION I. — LEGAL MORTGAGE.

LANDS OF THOMAS, ARCHBISHOP.

DOMESDAY INQUISITION, 1085.

[*Placita Anglo-Normania*, 58.]

IN the time of King Edward, Almaer predecessor of Archbishop Thomas was seised of X bovates of land in Ulingeham. This land was put in pledge by Raynerus of Brimon for III pounds in the time of King Edward. And the inquest affirmed that the archbishop ought to hold the lands until the III pounds had been returned to him.

OSBERT DE HINTON ET UX. v. EUSTACE DE MORTON ET AL.

KING'S BENCH, 1201.

[*Select Civil Pleas (Selden Society)*, p. 36.]

THE assize comes to recognise if John de Tysoe and Eustace de Morton and Robert son of Matilda, have unjustly and without judgment disseised Osbert de Hinton and Matilda his wife of their free tenement in Shotteswell within the assize. Eustace de Morton afterwards came and said that Osbert had pledged to him all his (Osbert's)

land of Shotteswell for a term of six years, and (Eustace) produces (Osbert's) charter testifying the same. So that after the pledge was made, came Osbert, contrary to his charter, and carried off his hay. So that Eustace complained before the Justices in Eyre, to wit, Hugh Bardolph and Henry de Wichinton and their fellows, at Warwick, and on account of his complaint (Osbert), was seized and put in prison. And before the same Justices (Osbert) admitted the pledge made to Eustace, and (Eustace) vouches those Justices to warranty thereof. Osbert afterwards came and put himself in mercy. And be it known that Eustace quit-claimed to Osbert the agreement made touching that land, for fifteen shillings, which Osbert gave him.¹

COLLAN *v.* POTTEFORD.

KING'S BENCH, 1302.

[Y. B. 30 Ed. I., p. 210.]

EVE COLLAN, &c. against Richard Potteford; and complained of being disseised of a furlong of land, &c. *Kyngesham*: She is wrong in bringing this assise, for she herself enfeofed us of these tenements, by her deed which is here; judgment, &c. *Middleton*: Seised and disseised; and we pray the assise. *Kyngesham*: We have put forward her deed by way of bar, and she is of full age, and here in court, and she brings forward no title to show how she has become seised since (the deed), judgment, &c. HERVY: Say how she was seised. *Middleton*: This Eve enfeofed him as the deed shows; but with this covenant, that if she paid him, &c., within such a time, then she should have again her land; she did pay him, and re-entered the land, Richard giving it up; and thus she was seised, &c. *Kyngesham*: She alleges a covenant, and shews no specialty to evidence it; judgment, &c. And on the other hand, we will aver that we never gave up the land, &c. SPIGONEL: Suppose that I execute a charter giving you my land, and that I do not give you seisin thereof, and you come and disseise me, shall the existence of that deed be a good reason for depriving me of the assise? *Kyngesham*: That is not in point, for she has admitted that we entered by virtue of her charter; and to defeat that entry she alleges a covenant, but does not produce in court any specialty to prove the covenant; judgment, &c. HERVY: Let the assise come. THE ASSISE said that Eve had bought from Richard a chest for the sum of four

¹ Compare: Liddeford *v.* Wike, 1 Rotuli Curie Regis, 86; Kedorro *v.* Emurton, Rolls of King's Court, Rich. I., 2; Maynard *v.* Chuerell, Placitorum Abbrevatio, 10; Lehr *v.* Odo, Select Civil Pleas, 17; Quentin *v.* Quentin, Assize Rolls, Northumberland, 5; Morse *v.* Insulla, 17 Oxford Documents, 229; Lerbrenie *v.* Tresgot, Bracton Note Book, No. 169; Verdorm *v.* Mortimer, 9 Staffordshire Collection, 40. — Ed.

marks, to be paid for at two times, and put Richard in seisin by the charter, with a condition that if she paid at the times appointed, she should have again her land; that she paid him two marks at the first period; and when the other period arrived he would not receive the money; that she tendered it to him in the County Court, and he would not receive it; that she deposited the money under the sheriff's seal, and then entered the land, and was seised of the messuage for a day and a night. BRUMPTON: Quite seisin enough in such a case, &c.; wherefore, &c., her seisin with the damages; and because the land had been improved, she shall recover less damages.¹

BODENHAM *v.* HALLE.

CHANCERY, 1456.

[*Select Cases in Chancery (Selden Society)*, 137.]

To the right reuerent and worshipfull Fader in God, the Archbishop of Caunterbury, Chaunceller of Ingland,

Besecheth mekely Robert Bodenham, that where as he borrowed late of John Halle of Salesbury lxxx li., for the whech the seyd John, thorgh (through) sotyll promys caused the saide Robert of trust, the fyrst day of May the xxxij yere of the Raynyng of oure Soueraygne lorde the kynge that nowe ys, to enfeffe the saide John in the manere of Shipton Berenger yn Suth' Shyre, to haue and holde hit to the saide John, hys heyr and assign, vnder condicion that yif the saide Robert, hys heires or executoures paye or dyd paye to the saide John or to his assignes C li. at the feste of seynt John the Baptiste that shall be in the yere of oure lorde M. CCC. lxj, that thenne the saide feffement sholde be voide, as by a dede endented therof made pleynty appereth, so that the said John purposeth therby to resceue and haue the issues and profites of the said manere vnto the saide day of payment, which will extende to the some of lxxxv markes, and also C li. by way of vsury for the lone of the said lxxx li., or elles the saide maner to be lost and forfeited to hym. Moreouer the saide John, ymagynynge more desceyte to distrue the said Robert, caused hym by sotelte to be bounde to the saide Robert in CCC li. by an obligation of the Statuyt Marchant of Salesbury bereing date the ij day of the saide moneth of Maye; which the saide Robert delyuered to on John Gardner to kepe it tyll suffisant endentures in deffesaunce there of were made by men lerned bytwene the saide Robert and John that the said condicion shulde be perfourmed. And not withstanding that the saide endentures both not yet made and that the saide obliga-

¹ Compare: *Adam v. B.*, Y. B. 21 Edw. I., 222; *Anon.*, Y. B. 34 Edw. I., 164; *Anon.*, Y. B. 12 Edw. III., 3; *St. John v. DeGray*, Y. B. 13 Edw. III., 122; *Anon.*, Y. B. 34 Edw. III., 164; *Anon.*, Y. B. 17 Edw. III., 2; *Anon.*, Y. B. 36 Hen. VI., 7. — Ed.

cion remayneth with the saide John Gardner, and the saide John Halle hath sued execucion vppon the saide statute of the saide CCC li. by vertue wherof he hath take the saide Robert and put hym into streyte pryson at Salesbury; so that the saide John purposeth to have CCCCL li. and more of the saide Robert for the lenyng of lxxx li., ayeynes ryght and conscience, in fynall distruccon of the saide Robert; Wherof he may haue no remedy by the Comyn Lawe. Please it youre gracious lordship to sende for the saide John by a writte *sub pena* for to appere byfore yow at a certeygne daye, to answeare to the premisses, and thervppon ye to execute Justice as good feyth and consciens requyreth: for the love of god and in the werk of Charyte.

[*Indorsed on the bill: prayer granted; statute cancelled; re-enfeoffment ordered.*]¹

LANGFORD v. BARNARD.

CHANCERY, 1595.

[*Tohill*, 134.]

THE Court decreed money to the Plaintiffe against the Defendant, albeit hee had Judgement and Execution, being upon the point of usurious Contract, and a Lease being become forfeited, and the Mortgagee devised the same to Infants. The Court was of opinion, that the Plaintiffe should have it again paying the money.²

ANONYMOUS.

COMMON PLEAS, 1562.

[3 *Léonard*, 6.]

THE Lessor mortgaged his Reversion in Fee, to the Lessee for years, and at the day of Mortgage for payment of the Mony, he paid the Mony; It was holden in this Case, that the Lease for years was not revived, but utterly extinct.³

¹ Compare: *Boddesworth v. Coke*, 1 Cal. Ch. lxvii; *Anon.*, Y. B. 9 Edw. IV., 25, 34; *Emanuel College v. Evans*, 1 Rep. Ch. 18; *Ferrie v. Rome*, 2 Freeman Ch. 258; *Lockwood v. Ewer*, 2 Atk. 303. — Ed.

² Compare: *Newcomb v. Bonham*, 1 Vern. 7; *Clark v. Reyburn*, 8 Wall. 318; *Davis v. Hubbard*, 38 Ala. 185; *Wilson v. Brannan*, 22 Cal. 258; *Pritchard v. Elton*, 38 Conn. 434; *Meyer v. Bank*, 44 Ia. 212; *Gabbert v. Swatz*, 69 Ind. 450; *Wilde v. Crane*, 53 Ill. 490; *Mitchell v. Burham*, 44 Me. 286; *Tims v. Shannon*, 19 Md. 289; *Erskine v. Townshend*, 2 Mass. 493; *Glass v. Ellison*, 9 N. H. 69; *Shields v. Lozier*, 34 N. J. L. 496; *Benzin v. Lenoir*, 16 N. E. 225; *Clarke v. Robinson*, 18 R. I. 231; *Briggs v. Fish*, 2 D. Chip. 100. — Ed.

³ Compare: *How's Case*, 3 Keble, 432; *Taylor v. Waters*, 1 Myl. & C. 266; *Brown*

GOODALL'S CASE.

KING'S BENCH, 1598.

[5 Coke, 195.]

BETWEEN Cuthbert Goodall, plaintiff, and John Wyatt, defendant, in an *Ejectione firmæ* of lands in Ailesbury, in the county of Buck, (which began Hil. 37, Rot. 805). The defendant pleaded not guilty, and the jurors gave a special verdict to this effect; Sir John Packington was seised of the tenements aforesaid in fee, and by his deed indented, 1 Julii. 35 Eliz. did thereof enfeof Robert Woodcliff and his heirs, proviso semper quod si præfat' Johannes infra unum annum post decessum ipsius Roberti solvat, seu solvi faciat hæred', executor', sive administrator' ipsius Roberti summ' centum marcarum legalis monet' Angl', quod tunc et deinceps presens charta indentata et seisina inde habita, vacua sit nullius vigoris, Robert Woodcliff did thereof enfeof Edward Woodcliff, whose estate by divers mean conveyances Thomas Goodall the lessor of the plaintiff had: and afterwards 7 Jan. 35 Eliz. the said Robert Woodcliff died, after whose death Drue Woodcliff being his son and heir, and Anne his wife took letters of administration of his goods; by which Drue and Anne made a letter of attorney to Thomas Goodall to demand and receive the said 100 marks on the said proviso or condition, of which the said Thomas Goodall gave notice to the said Sir John Packington; and afterwards, and within the said year, it was agreed between the said Sir John and the said Drue, that the said Sir John should pay to the said Drue but £32 of the said 100 marks, and no more, and yet in appearance for the better performance of the condition, that the whole sum of 100 marks should be paid, and that the residue above £32 should be repaid to Sir John; upon which Sir John paid within the said year 100 marks to the said Drue, and presently all was repaid to the said Sir John but the said £32 according to their preceding agreement aforesaid; and afterwards the said Sir John did re-enter into the said tenements, pretending that he had performed the condition, upon whom the said Thomas Goodall entered, and made the lease to the plaintiff, who entered and was possessed, until the said John Wyatt ousted him (without conveying any interest or authority to the said Wyatt under Sir John Packington), but the jury concluded, et si super totam materiam, &c. præd' solutio, præd' centum marcarum per præd' Johannem Packington milit' præfat' Drugoni fact', sit bona et legalis solutio in lege earundem centum marcarum, secundum formam provisionis præd' juratores prædicti

v. Bass, 4 Wall. 262; West v. Hendrix, 28 Ala. 226; Stuyvesant v. Mortgage Co., 22 Col. 28; Cram v. McGoon, 86 Ill. 431; Chase v. Ball, 29 Ind. 311; Martin v. Trust Co., 78 Ia. 504; Chaunaud v. Herbert, 30 La. Ann. 404; Richardson v. Cambridge, 2 Allen, 118; Cook v. Bell, 114 Mich. 475; Bishop v. Chase, 156 Mo. 158; Breese v. Bange, 2 E. D. Smith, 474; Sawyer v. Slem, 27 S. C. 251. — Ed.

ignorant: et si, &c. So that the doubt which the jury conceived, was only on the said payment; and whether the said payment, as is aforesaid, was sufficient in law to give title of entry by force of the said condition to the said Sir John Packinton on the said Thomas Goodall: and it was objected on the defendant's part that although before the payment it was agreed between the said Sir John Packington and the said Drue Woodcliff, that the said Drue should have but £32 of the said 100 marks, yet Sir John paid the whole, and Drue received the whole, and the property of all the moneys was in Drue; and if Drue would not have repaid him the residue above £32 Sir John had not any remedy, but an action on the case (if any action on the matter would lie). And therefore they concluded that it was a good payment to satisfy the said condition.

But to that it was answered and resolved by POPHAM, Chief Justice, and the whole court, that it was not any performance of the condition, and their reason was, because an estate of inheritance was by the payment of the said money to the heir to be divested out of Thomas Goodall, the assignee of the land; and therefore the condition ought to be performed in truth by a true and effectual payment, and not by a shadow or color of payment: and in the case at bar the precedent agreement guided the subsequent payment, and their intent was, that only the said £32 should be enjoyed and kept, although more was in appearance paid; but the estates of third persons shall not be divested by colorable or covinous payments, but by true and effectual payments, as is aforesaid. *Vide* 19 Hen. VI., 54, 20 Edw. III., Accompt 79, and 18 Edw. IV., 18, where it appears, that conditions ought to be performed truly and effectually, *quia factum non dicitur, quid non perseverat*.

It was resolved, that if all the money had been paid to the heir *bona fide* (although Robert Woodcliff his father had conveyed over his whole estate in the land) it had been sufficient. For the heir is a person expressly named in the condition to whom the payment shall be made, and the feoffor is a stranger to the conveyance that the feoffee and his assigns made, and the feoffor shall not take notice at his peril of the validity of them, nor of the conditions or limitations annexed to them.

It was resolved, that as this condition is in the case at bar, the feoffor could not have paid it to Goodall the assignee of the land, for heirs, executors, or administrators were expressed in the condition, and the assignee not, as in the case of Litt. lib. 3, cap. Condition, 78. If the condition was, that if the feoffor shall pay to the feoffee, or to his heirs, such a sum on such a day, there, after the death of the feoffee if he dies before the day limited, the payment ought to be made to the heir at the day set, where this word (ought) which imports necessity in law, was observed; and therefore in such case the money shall not be paid to the executors. And so the doubt in 12 Edw. III., Condition, 9 and Dyer, 2 Eliz. 181, well resolved; but the assignee of the land, although he be not named in the condition amongst the persons who shall pay

the money, yet he may well pay the money for the saving of his tenure, as Litt. saith, *eodem*, lib. fol. 77. So note the difference, that the money shall not be paid to the assignee of the land without naming him in the condition, for there the payment goes to the defeasance of the inheritance, but the money shall be paid by the assignee in salvation of his inheritance.¹

PHELPS v. SAGE.

SUPREME COURT, CONNECTICUT, 1805.

[2 Day, 151.]

THIS was an action of ejectment; to which the general issue was pleaded.

On the trial, the defence set up was, that before the commencement of the suit, the plaintiff had conveyed the premises to Patrick Johnson. To repel this defence, the plaintiff offered to prove, that at the time she gave the deed, she and Johnson were both ousted of possession, by the entry and adverse possession of the defendant; claiming, that in consequence of which the deed was void, under the statute against selling disputed titles. To the admission of this evidence, the defendant objected, on the ground that the plaintiff was estopped from alleging any thing against her own deed, and that she could not be permitted to allege her own violation of law as the basis of a recovery. The court overruled the objection, and admitted the evidence. In the further progress of the trial, it appeared, that the plaintiff claimed under a mortgage deed, and the defendant under a subsequent absolute deed, from the same person. In order to show that the plaintiff's title was divested, the defendant offered to prove, that after the expiration of the law-day, the whole mortgage money was paid to the plaintiff's satisfaction. To the admission of this evidence the plaintiff objected, alleging that no payment of the money, or settlement of the debts, after the law-day had expired, could divest the plaintiff's title, and revest it in the mortgagor, but that the remedy was by application to a court of chancery. On this principle, the court rejected the evidence. To the ruling of the court, in both instances, the defendant filed his bill of exceptions.

By THE COURT UNANIMOUSLY,

*The judgment was affirmed.*²

¹ Compare: *Astwick v. Watkins*, 1 Leon. 34; *Wade's Case*, 5 Rep. 114; *Lomax v. Bird*, 1 Vern. 182; *Butts v. Broughton*, 72 Ala. 294; *Storch v. McClain*, 85 Cal. 304; *Camp v. Smith*, 5 Conn. 80; *O'Neill v. Doughett*, 40 Kans. 689; *Sprague v. Adamson*, 62 Ia. 661; *Insurance Co. v. White*, 106 Ill. 77; *Phillips v. Leavitt*, 54 Me. 405; *Powers v. Lumber Co.*, 43 Mich. 468; *Bigelow v. Wilson*, 1 Pick. 493; *Boerman v. Caulet*, 21 Miss. 149; *Averell v. Taylor*, 8 N. Y. 44; *Pearcy v. Tate*, 91 Tenn. 478; *Zaegel v. Kuster*, 51 Wis. 31.—Ed.

² Compare: *Gyles v. Hall*, 2 P. Wms. 378; *Mitchell v. Roberts*, 5 McCrary, 425;

ROBY v. MAISEY.

KING'S BENCH, 1828.

[8 B. & C. 767.]

EJECTMENT. At the trial before GASELEE, J., at the last Gloucester Summer Assizes, it appeared that the premises had been mortgaged in fee by the defendant to the lessor of the plaintiff, that the mortgage was forfeited, and that the defendant remained in possession. The usual evidence of the mortgage deed was given, but there was no proof of any demand of possession. Upon this it was contended, that the plaintiff ought to be nonsuited; but the learned judge directed a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit.

LORD TENTERDEN, C. J. The mortgagor is not in the situation of tenant at all, or at all events, he is not more than tenant at sufferance; but in a peculiar character, and liable to be treated as tenant or as trespasser at the option of the mortgagee. *Rule refused.*¹

HALL v. SURTEES.

KING'S BENCH, 1822.

[5 B. & Ald. 687.²]

THIS was a writ of error, brought to reverse a judgment obtained in ejectment in the Court of Pleas at Durham.

ABBOTT, C. J. Upon this finding, I am of opinion that this must be considered as an occupation by the permission of the mortgagee; and if so, there was no adverse possession, and the statute of limitations does not apply. The payment of interest would have been conclusive evidence of a continuing tenancy. That fact is not found by the jury; but that is not the only ground upon which the court can proceed. If there were any circumstances from which the jury might have presumed that the premises were not occupied by the permission of the mortgagee, they ought to have found that fact. Here, however,

Cross v. Robinson, 4 Conn. 379; Cram v. McGoon, 86 Ill. 431; Storey v. Crewson, 55 Ind. 397; Stewart v. Crosby, 50 Me. 130; Hermanns v. Fleming, 151 Mass. 1; Shields v. Lozier, 34 N. J. L. 496; Parker v. Beasley, 116 N. C. 1. — Ed.

¹ Compare: Smartle v. Williams, 1 Salk. 245; Thunder v. Belcher, 3 East. 449; Woodward v. Parsons, 59 Ala. 625; Rockwell v. Braddley, 2 Conn. 1; Webster v. Calden, 56 Me. 204; Lackey v. Holbrook, 11 Metc. 458; Pettingill v. Evans, 5 N. H. 54; Soper v. Guernsey, 71 Pa. 219; Stedman v. Gasset, B. & F. 346. — Ed.

² Only one opinion is printed. — Ed.

is nothing to justify us in presuming that this occupation was not by the permission of the mortgagee. The judgment, therefore, must be for the plaintiff.¹

WILKINSON v. HALL.

COMMON PLEAS, 1837.

[3 Bing. N. C. 508.]

THIS was an action of debt upon the statute 4 Geo. II., c. 28, s. 1, brought by the plaintiff, who claimed as one of two tenants in common in fee of a wharf and warehouse, called Botolph Wharf, or Botolph Quay, in the city of London, against the defendants, as tenants of same premises, to recover double the yearly value of one undivided moiety of the same premises, which it was alleged the defendants had wrongfully held over after the service upon them of notice to quit and demand of possession. The plaintiff before demise made by him to the defendant had mortgaged his interest to one Ellis in fee who had by clause in the deed made a redemise to the plaintiff.

VAUGHAN, J. Looking at this agreement, I can see nothing in it that points to a yearly taking; on the contrary, the reservation of rent, and other stipulations, plainly show that the letting was by the quarter only. Whether such a holding comes within the enactment of Geo. II. is a grave question, which I do not decide; but I have no doubt that an action for use and occupation lies. The deed shows a studious anxiety to give a legal right to the mortgagor to hold the premises till the year 1840, notwithstanding the conveyance to Wynn Ellis in fee. In modern times it has been usual to insert these special provisos in mortgage deeds, and the effect of them is to give the mortgagor complete control over the property as tenant for years, to the mortgagee. Then, to support the action for use and occupation, the plaintiff must show an occupation by the defendant; the value of the premises; and that the defendant occupied by permission of the plaintiff. The two first points are not contested here, and the last must be implied from the situation and conduct of these parties.

*Judgment for plaintiff on the third count, for defendants on first and second.*²

¹ Compare: Babcock v. Wyman, 19 How. 289; Crawford v. Taylor, 42 Ia. 260; McPherson v. Hayward, 81 Me. 329; Stevens v. Savings Bank, 129 Mass. 547; Humphrey v. Hurd, 29 Mich. 44; Anding v. Davis, 38 Miss. 574; Benton Co. v. Czarlinski, 101 Mo. 275; Overton v. Bigelow, 36 N. Y. 513; Doyle v. Mellen, 15 R. I. 523; Wright v. Sperry, 25 Wis. 617. — Ed.

² Compare: Nash v. Preston, Cro. Car. 190; Prihorn v. Souster, 8 Exch. 763; Trent v. Hunt, 9 Exch. 14; Whitaker v. Halls, 7 Bing. 322; Wilkinson v. Goodrer, 10 Q. B. 957; Alchorne v. Gonne, 2 Bing. 54; Wheeler v. Branscombe, 5 Q. B. 373; Clay v. Wren, 34 Me. 187; Merriam v. Goss, 139 Mass. 77; Coal Co. v. Detmold, 1 Md. 225; Soper v. Guernsey, 71 Pa. St. 219; Pierce v. Brown, 24 Vt. 165. — Ed.

NUGENT *v.* RILEY.

SUPREME COURT, MASSACHUSETTS, 1840.

[1 Met. 117.]

SHAW, C. J. The first and principal question in this case is, whether the construction of the lease in question was correct. The judge instructed the jury, that the lease described in the case constituted an interest or term defeasible on a condition, and therefore had the character of a mortgage. The instrument purports to be an indenture, but was executed by the lessor only. It is a common lease of tenements for seven and a half years, acknowledged and recorded. It recites that the lessee has paid \$78.64 in full for the rent for the whole term. Then comes this clause. "And the lessee covenants, promises, and agrees to reconvey said premises to the lessor, upon the payment of the aforesaid sum and interest thereon." It has often been held, that where, upon a conveyance of an estate or interest in land, there is a stipulation in the deed itself or in any separate deed executed at the same time, and constituting with the conveyance one transaction, that the estate shall be reconveyed, upon the payment of money, such stipulation constitutes a defeasance, as much as if the words were "on condition," or "provided however," &c. *Taylor v. Weld*, 5 Mass. 109; *Carey v. Rawson*, 8 Mass. 159; *Scott v. McFarland*, 13 Mass. 310. This rule is most frequently applied to the case of conveyances in fee, but a conveyance for life or years falls within the same principle.

Being then a conveyance for a term of years, defeasible upon a condition, the relation of the parties is that of mortgagor and mortgagee.

In the present case there is no covenant, technically, on the part of the lessee, to reconvey upon condition, because he has not executed the instrument; but being inserted in the same conveyance which raises the term and leases the estate, it enures by way of condition; and the lessee, by accepting the deed, in the form of an indenture, but in effect a deed poll, becomes bound by the condition.

The parties then standing in the relation of mortgagor and mortgagee, all the rights and duties incident to that relation attach to them. The mortgagee, being in possession and taking the rents and profits, must upon redemption account for them, as payment, first to keep down the interest, and the surplus, if any, towards the principal. *Newall v. Wright*, 3 Mass. 138.

Another important consequence is, that in this case, if the \$78.64 is paid at any time during the term, the condition is saved at law, the estate for years created by the lease is defeated, and the lessor is in of his old estate; whereas, in the common case, if the money is not paid within the time, the condition is broken at law, the estate of

the mortgagor is reduced to an equity of redemption, and he must have a bill to redeem, in order to restore him to his estate.

The rents and profits, received by a mortgagee in possession, either before or after condition broken, are so exclusively appropriated by law, without any act of the parties, to the payment of the interest and principal of the debt, or sum to be paid, in order to defeat the estate, that when they amount to a sufficient sum to extinguish the debt, including such principal and interest, the debt is *de facto* paid. If this occurs before condition broken, the estate is defeated, and the mortgagor may enter.

In the present case, it is found that the defendant had received, of the rents and profits of this estate, a sum much more than sufficient to pay the \$78.64, and interest, together with repairs and all costs, charges, and expenses of every kind; and this being before breach of condition, the lease was determined.

Then comes the question, whether the plaintiff can recover the surplus, over and above the payment of his debt, in an action for money had and received. Had the defendant occupied the estate himself, it would have presented a question of more difficulty. But the case finds that he let out the estate to others, and received the rents. All that he received after his debt was paid, he could not receive as mortgagee, because his term then expired. He received it as money, to which the plaintiff, in good conscience, was entitled. He then received it to his use, and this action will lie for it.

It was said that the remedy of the plaintiff should be sought for on the covenant of the lessee. Probably the counsel for the defendant did not advert to the fact, that the deed is not executed by the defendant, so that there is no covenant, technically, on his part. Perhaps the acceptance of a deed poll would create an express promise on the part of the grantee, to perform acts on his part stipulated in the deed to be performed. *Goodwin v. Gilbert*, 9 Mass. 510. When such promise results in nothing more than a duty to pay money, general *indebitatus assumpsit* will lie.

But there is another consideration applicable to this objection. There is no stipulation, on the part of the lessee, to account for the surplus rents, after the debt is paid, but only to reconvey the estate, when it is paid. If he received rents after his debt was paid, he received money which equitably belonged to the plaintiff, and the duty of paying it results and raises a promise implied by law, to enforce which this is the proper form of action.

*Judgment on the verdict.*¹

¹ Compare: *Re Watson*, 25 Q. B. D. 27; *Barroilhet v. Battellee*, 7 Cal. 450; *Dougherty v. Thompson*, 7 Blackford, 277; *Packard v. Corporation*, 77 Md. 240; *Stewart v. Murray*, 13 Minn. 436; *Halo v. Schiek*, 57 Pa. St. 320; *Graham v. Way*, 38 Vt. 199. — Ed.

TOOMER v. RANDOLPH.

SUPREME COURT, ALABAMA, 1877.

[60 Ala. 356.]

APPEAL from the Circuit Court of Hale.

The record does not show the name of the presiding judge.

This action was brought by the appellants, suing as partners, against Philip B. Cabell; and was commenced by attachment, sued out on the ground of the defendant's non-residence. The affidavit for the attachment was made on the 26th January, 1876, before a justice of the peace of the city and county of Mobile, by whom also the attachment bond was taken and approved; and it is recited in the bond that the attachment has been obtained, returnable to the next term of the Circuit Court of Hale. The attachment set out in the record, which is dated the 29th February, 1876, was issued by the clerk of the Circuit Court of Hale, and was executed by summoning T. B. Randolph, by process of garnishment, as the debtor of said Cabell. The plaintiffs' cause of action was the defendant's promissory note for \$706.84, dated the 25th February, 1874, and payable to the plaintiffs, at their office in Mobile, on or before the 1st December, 1874. The garnishee appeared, in answer to the summons, and filed the following answer:

"On or about the 28th December, 1870, this garnishee loaned to said P. B. Cabell the sum of \$5,000; for which said Cabell contracted and agreed to pay him ten per cent *per annum* interest thereon; and said Cabell paid interest on said loan, according to said contract, up to 1st January, 1873. At the time of making said loan to said Cabell, he, the said Cabell, executed to this garnishee his promissory note, secured by a mortgage, with power of sale, upon the following lands," describing them; "a copy of which mortgage is hereto attached as a part of this answer, and referred to as a part of this answer. Said Cabell failed to pay any interest on said loan, after the 1st January, 1873; and thereupon, on or about the 1st January, 1875, garnishee took possession of said land under said mortgage, and rented it for the year 1875, for fourteen bales of cotton; of which rent, he collected twelve bales, and sold them on or about the 1st November, 1875, the net proceeds amounting to \$720, which was received by this garnishee; and the other two bales garnishee paid and allowed to the tenant, Sylvester Robinson, for repairing gin-house and screw. Afterwards, on or about the 6th December, 1875, garnishee proceeded to advertise and sell said real property, for the satisfaction of said debt, in accordance with the power of sale in said mortgage; and at the sale thereof, on the 6th December, 1875, had the same bid in for him, by his attorney, for

the sum of \$6,651.43, there being no other bid for said property. Garnishee conveyed said lands, by deed, to one P. A. Tutwiler, for a consideration of \$6,651.43, and said Tutwiler immediately reconveyed said lands to him, for \$6,651.43; but no money was paid by said Tutwiler to garnishee, nor by garnishee to said Tutwiler. Garnishee had paid out on said land, taxes for 1874, \$100; taxes for 1875, \$100.72; advertising sale of said property, \$12; auctioneer's fee, \$5; and the interest on said mortgage debt, at the time of the sale, was \$1,464.59; and there was due from this garnishee to said Cabell, as a credit on said mortgage debt, the sum of \$35, for a cow bought of him. Plaintiffs hold a second mortgage on said lands. Garnishee does not deny their right, or the right of the defendant in attachment, to redeem said property, or to have the rent referred to appropriated, *pro tanto*, in extinguishment of said debt; and he is and has been willing, and has offered, to take in redemption thereof less than the amount actually due, deducting said rents, and now offers to do so. Otherwise than as may be shown by the above statement of facts, garnishee is not now, and was not at the time of the service of the garnishment in this case, indebted to the said P. B. Cabell, nor did he have any effects, goods, &c., belonging to said defendant, in his possession, or under his control."

On this answer, the court refused to render a judgment against the garnishee, and discharged him; and this judgment is now assigned as error by the plaintiffs in attachment.

BRICKELL, C. J. A mortgagee, if there is not in the mortgage a stipulation to the contrary, or a reservation by the mortgagor of possession until default in the payment of the mortgage debt, has the immediate right of entry, and may eject the mortgagor or his tenants. *Duval v. McLoskey*, 1 Ala. 737; *Welsh v. Phillips*, 54 Ala. 309. The theory of a mortgage, prevailing in this State, is that, at law, it creates in the mortgagee a direct, immediate estate in the land—a fee simple, unless otherwise expressly limited. The estate is conditional—annexed to the fee is a condition, which may defeat it. If the mortgagor, not having reserved the right of possession until default in the performance of the condition, remains in possession, he is the mere tenant at will of the mortgagee. After the law-day, and default in the performance of the condition, the estate vests absolutely in the mortgagee—the fee is freed from the condition annexed to it. Nothing remains in the mortgagor but the equity of redemption, of which, as between mortgagor and mortgagee, courts of law do not take notice. Before default, all that remains in him is the right to perform the condition, and thereby restore his original estate. *Paulling v. Barron*, 32 Ala. 11; *Barker v. Bell*, 37 Ala. 358; *Welsh v. Phillips*, *supra*.

In courts of equity, the theory of a mortgage is, that until foreclosure it is a mere security for a debt, the mortgagor continuing the real owner of the fee. From this theory results the general principle,

that a mortgagee in possession, before or after default in the payment of the mortgage debt, and before foreclosure, is a trustee of the rents and profits for the mortgagor, and bound to apply them in extinguishment of the mortgage debt. *Davis v. Lassiter*, 20 Ala. 561; 2 Wash. Real Prop. 221, § 9. All reasonable expenditures for taxes, necessary repairs, and other necessary expenses incurred on account of the estate, the mortgagee is allowed to retain from the rents and profits; and it is the balance only which may be applied in extinguishment of the mortgage debt. An accounting is necessary to the ascertainment of the balance. The law does not apply the balance of the rents and profits to the mortgage debt; for, at law, they accrue to the mortgagee, as the owner of the legal estate. It is in equity only the application is made, in the nature of an equitable set-off, and as an incident to the right of redemption. *Hubbell v. Moulson*, 53 N. Y. 225.

2. If it is admitted that the mortgagor, notwithstanding the second mortgage to the appellants, has a right to compel the application of the rents received by the appellee while in possession, to the payment of the mortgage debt, the remedy is exclusively in equity, and is incidental to the right of redemption. In a court of law, the appellee is regarded as having received only and simply the issues of his own estate. A garnishment is strictly a legal proceeding, operating only on the rights of the defendant in attachment or judgment, which he could in an action at law enforce in his own name. It cannot be converted into a method of drawing within the jurisdiction of courts of law matters and rights of purely equitable cognizance. *Harrell v. Whitman*, 19 Ala. 135; *Roby v. Labuzan*, 21 Ala. 60; *Godden v. Pierson*, 42 Ala. 370; *Henry v. Murphy*, 54 Ala. 246.

What may be the rights of the appellants, as subsequent mortgagees, cannot be considered or determined in the present proceeding. A garnishment is not a remedy for the enforcement of any cause of action vesting only in the creditor suing it out. Its whole scope and operation is to subject legal demands recoverable only by the debtor, or property of his which is subject to execution. *Henry v. Murphy*, *supra*; *Thompson v. Wallace*, 3 Ala. 132.

*There is no error in the record, and the judgment is affirmed.*¹

¹ Compare: *Bagnall v. Villar*, 22 Ch.D. 812; *Greer v. Turner*, 36 Ark. 17; *Farns v. Houston*, 76 Ala. 250; *Kellogg v. Rockwell*, 19 Conn. 446; *Holt v. Rees*, 46 Ill. 181; *Galleher v. Davidson*, 43 La. Ann. 526; *Byers v. Byers*, 65 Mich. 598; *Hannah v. Davis*, 112 Mo. 599; *Hubbell v. Moulson*, 53 N. Y. 225; *Dawson v. Drake*, 30 N. J. Eq. 601; *Leach v. Curtin*, 123 N. C. 85; *Rittenbaugh v. Hudwick*, 31 Pa. 131; *Chapman v. Smith*, 9 Vt. 153. — Ed.

CASBORNE v. SCARFE.

CHANCERY, 1738.

[1 Atk. 603.]

THE father of the plaintiffs devised to Anne his daughter, the plaintiff's eldest sister, all his estate, freehold and copyhold, in fee, charged with £200 a-piece to the plaintiffs. Anne, after her father's death, possessed the several estates, and afterwards intermarried with the defendant Inglis, and soon after died, leaving issue a son, who died an infant and without issue, upon whose death the plaintiffs, as heirs at law both to the infant and their sister, became entitled to the real estate. Anne Inglis, before her marriage, mortgaged part of the freehold premises to the defendant Scarfe in fee for £900. The bill is brought against the mortgagee and the husband for an account, and for the direction of the court.

The defendant Alexander Inglis insisted that, having had issue by his wife, he was entitled to an estate for life, as tenant by the curtesy, in his late wife's freehold premises, subject to the mortgage of the defendant Scarfe.

On the 25th of March, 1738, the cause stood for judgment.

LORD CHANCELLOR. This question depends on two considerations.

First, What sort of interest an equity of redemption is considered to be in this court ?

Secondly, What is requisite to entitle the husband to be tenant by the curtesy ?

First, An equity of redemption has always been considered as an estate in the land, for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by a fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seisin ; the person therefore entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets.

By a devise of all lands, tenements, and hereditaments, a mortgage in fee shall not pass, unless the equity of redemption be foreclosed ; and if, after such devise made, a foreclosure is had, yet such estate shall not pass by those general words of lands, tenements, and hereditaments, because a foreclosure is considered as a new purchase of the land.

The interest of the land must be somewhere, and cannot be in abeyance ; but it is not in the mortgagee, and therefore must remain in the mortgagor. A. devises his estate and after makes a mortgage in fee, though that is a total revocation in law, yet in this court it is a revocation *pro tanto* only.

It is certain the mortgagee is not barely a trustee to the mortgagor, but to some purposes, *videlicet*, with regard to the inheritance he certainly is, till a foreclosure.

Secondly, At common law, four things are necessary to entitle the husband to the tenancy by the curtesy, marriage, issue, death of the wife, seisin in fact. In this case the three first concur, but it is objected, that here is no seisin whatever of the legal estate in the wife in the consideration of the law. But that is not the present question; the true question is, if there was such seisin or possession of the equitable estate in the wife, as in this court is considered as equivalent to an actual seisin of a freehold estate at common law, and I am of opinion there was.

For these reasons I am of opinion the defendant is entitled to be tenant by the curtesy, and the decree at the Rolls, as to this part, must be reversed.¹

CHINNERY v. BLACKBURNE.

KING'S BENCH, 1784.

[1 *H. Blackstone*, 117 n.]

GENERAL *indebitatus assumpsit* for freight of goods. — Plea general issue. — Verdict for the plaintiff, subject to the opinion of the court, on a case, which stated, that by an indenture of assignment dated January 4, 1783, Robert Merryfield, in consideration of £1,166 18s. which he owed to the plaintiff, assigned to her the ship B. &c. in which indenture there was a covenant from the plaintiff to reassign the said ship, &c. to Merryfield, on payment of £1,166 with lawful interest, on or before the 10th of November then next ensuing: that at the time of the execution of the deed, the ship was in the River Thames, and afterwards sailed to Portsmouth, and continued there till the middle of March following, in the possession, and under the command of A. B. and that the plaintiff did not then take possession: that Merryfield navigated, victualled, and manned the ship, as owner thereof, at his own expense, and risk, both from England to Antigua, and on her return from thence: that Merryfield, at Antigua, gave the command of her to Captain Drysdale, and sent her to England, with orders to the captain, to address himself to Messrs. Dunlop of London, merchants, who were to sell her according to the directions contained in a letter, in which letter Merryfield also said, "Mrs. Chinnery has a demand against me, for near £1,200 sterling, which I hope to remit shortly to you, or Mrs. Merryfield, so as to pay her;" that Messrs. Dunlop being applied to as consignees,

¹ Compare: *Thorborough v. Baker*, 3 Swans. 628; *Flack v. Longmate*, 8 Beav. 420; *Huntington v. Smith*, 4 Conn. 235; *Thomas v. Hanson*, 44 Ia. 661; *Simonton v. Gray*, 34 Me. 50; *Prout v. Root*, 116 Mass. 410; *Merchants' Bank v. Thompson*, 55 N. Y. 7; *Miller v. Farmers' Bank*, 94 S. C. 427; *Hunt v. Dulaney*, 87 Va. 444; *Jones v. Parker*, 51 Wis. 218. — Ed.

lent two sums of £50 to Captain Drysdale, declaring they should consider him as responsible, in case they should not receive the same by freight, &c. and that they afterwards received the money from Drysdale: that the ship completed the delivery of the cargo, on the 27th of September, 1783; that the plaintiff took possession on the 29th September following, immediately on receiving information of her arrival in the Thames; that the defendant had goods from Antigua on board, the freight of which amounted to £76 9s. 11d. for the recovery of which the action was brought: that Captain Drysdale paid for lights, custom-house dues, and for clearing the ship, which the plaintiff repaid him, and also paid his and the mariners' wages, for the voyage from Antigua, to the amount of £234 7s. 7d. after she took possession of the ship; and that the plaintiff afterwards sold the ship by auction for £710, &c.

LORD MANSFIELD. The justice of the case struck me forcibly at first, as between the mortgagor and mortgagee: but the mortgagor is no party, the action is brought after the mortgage, against a person who contracted with the mortgagor. This action must be founded on the idea, that the mortgagor in possession is the servant and agent for the mortgagee, which is not the case. Till the mortgagee takes possession, the mortgagor is owner to all the world; he bears the expenses, and he is to reap the profits.¹

RUNYAN v. MERSEREAU.

SUPREME COURT, NEW YORK, 1814.

[11 Johns. 534.]

PER CURIAM. This was an action of trespass, *quare clausum fregit*. The plaintiff proved himself in possession of the *locus in quo*, and showed a title derived under a judgment against one James Leonard, who, it appeared, had mortgaged the land to Joshua Mersereau. By the pleadings, the question presented to the court is, whether the freehold was in the plaintiff, who had purchased the equity of redemption, under the judgment against the mortgagor, or in Joshua Mersereau, the mortgagee.

Courts of law, both here and in England, have gone very far towards, if not the full length of, considering mortgages, at law, as in equity, mere securities for money; and the mortgagee as having only a chattel interest. Lord Mansfield (Doug. 610) says a mortgagee,

¹ Compare: Gibbs v. Cruikshank, 8 C. P. 454; Evans v. Elliot, 9 A. & E. 343; Dixie v. Davis, 7 Exch. 89; Teal v. Walker, 111 U. S. 242; Davenport v. Bartlett, 9 Ala. 179; Wooten v. Bellinger, 17 Fla. 289; Ry. v. Express Co., 81 Ill. 534; Noyes v. Rick, 52 Me. 115; Gibson v. Farley, 16 Mass. 280; Chelton v. Green, 65 Md. 272; Morse v. Witcher, 64 N. H. 590; Leeds v. Gifford, 41 N. J. Eq. 464; Reeder v. Dergan, 15 S. C. 175; Abbott v. Egerton, 30 Vt. 308; Clarke v. Curtis, 1 Gratt. 289. — ED.

notwithstanding the form, has but a chattel, and the mortgage is only a security; that it is an affront to common sense to say the mortgagor is not the real owner. Mortgages are not considered as conveyances of land within the statute of frauds, and the forgiving the debt, with the delivery of the security, is holden to be an extinguishment of the mortgage. Mortgages will pass by a will not made with the solemnities of the statute of frauds. The assignment of the debt, or forgiving it, even by parol, draws the land after it, as a consequence. The debt is considered the principal, and the land as an incident only.

The interest of the mortgagee cannot be sold under execution. It is unnecessary to go into an examination of the cases on this subject; they have been repeatedly reviewed by this court. 3 Johns. Cases, 329; 1 Johns. Rep. 590; 4 Johns. Rep. 42. The light in which mortgages have been considered, in order to be consistent, necessarily leads to the conclusion that the freehold must be considered in the plaintiff, and he, of course, is entitled to judgment.

*Judgment for the plaintiff.*¹

WHITE v. RITTENMYER.

SUPREME COURT, IOWA, 1870.

[30 Iowa, 268.]

ACTION in trespass, for cutting and removing from certain lands of plaintiff a large quantity of wood and timber. Verdict and judgment for plaintiff in the sum of \$2,000. Defendant appealed to the general term, where the judgment of the District Court was affirmed. He now appeals to this court.

BECK, J. The petition avers that the title of the land in question is in plaintiff. The answer denies plaintiff's title, and sets up ownership in defendant. An issue is then formed involving the title of the lands, but it is not shown by the pleadings upon what facts the parties base their respective claims. From the evidence we learn that the title of each party has a common source in James McDonald. Plaintiff's title is derived from Agnes Gary, mother of James McDonald. James died in 1849. In 1846 he executed a mortgage to his brother Eneas upon the land, to secure \$300, with ten per cent per annum interest, due January 1, 1847. The instrument contains an express condition to the effect that, upon the non-payment of the debt at its maturity, the mortgagee may enter and take possession of the land. Eneas, dying, left his wife Mary as his sole heir. James left no other heirs than his

¹ Compare: *Witherell v. Wiberg*, 4 Sawy. 232; *Kidd v. Temple*, 22 Cal. 255; *Brown v. Snell*, 6 Fla. 741; *Chick v. Willetts*, 2 Kans. 384; *Reading v. Watermann*, 46 Mich. 107; *Bartlett v. Tumberlake*, 57 Mo. 499; *Dutry v. Graham*, 12 Tex. 437. — ED.

mother and Eneas, if the latter was capable of inheriting. The foregoing are the undisputed facts of the case. Other facts, asserted by the respective parties, are as follows: Plaintiff insists that, at the time of the death of James, Eneas was, and continued up to his decease, a non-resident alien. Defendant claims that Eneas, after forfeiture of the conditions of the mortgage by non-payment, entered upon and took possession of the land under the mortgage, and that he survived the mother, who died in 1853. There was evidence at the trial tending to prove these alleged facts, which, under the issues of the case, were passed upon by the jury. The assignment of errors relates to the instructions given and refused by the court, and the overruling of the District Court of a motion for a new trial, based upon the ground that the verdict is not supported by the evidence.

The first point of inquiry relates to the character of the interest or estate, in lands conveyed by a mortgage. Does the mortgagee acquire an inheritable estate?

The uniform language of the books is, that by a mortgage at common law the legal title is conveyed to the mortgagee, who is vested with the legal estate and freehold of inheritance. 1 Greenleaf's Cruise Dig. 570. But this rule of the common law is not recognized by the weight of the American authorities. In this country it may be considered the prevailing rule that the mortgagor, is the owner of the lands mortgaged, and retains the inheritable estate therein. At common law the performance of the condition of defeasance of a mortgage was considered to operate by divesting the estate in the mortgagee which was conveyed by the instrument. The doctrine of the American authorities, in effect, is, that it serves to vest, by its breach, the estate in the mortgagee, which, before, was in the mortgagor. The doctrine seems to be in harmony with the intent of the transaction when land is mortgaged. Its object is to pledge the land for the debt, and is nothing more than the creation of a security. The interest which the mortgagee holds is a lien upon the land for the debt, which may, by certain proceedings, ripen into a title, or rather, may divest the title of the mortgagor. If the condition of the mortgage be broken, some act of the mortgagee is necessary, that he may acquire an indefeasible title—a title which the mortgagor will not be able to defeat by redemption.

It may be admitted that this doctrine is anomalous. That a legal conveyance will not pass a legal title is not in accord with legal principles. In the contrary view, however, an anomaly is found which is quite as noticeable. A legal estate, which is vested by a legal conveyance, is defeated by the act of the grantor after the title has passed from him. Yet this is the case with a mortgage under the doctrines of the common law, for, if the debt be paid before forfeiture or foreclosure, the mortgagee's title ceases. *Anderson v. Neff*, 11 S. & R. 223; *Cameron v. Irwin*, 5 Hill, 276; *Goodwin v. Richardson*, 11 Mass. 470.

It may be said that the mortgage conveys a base or determinable fee, and that the estate created by the mortgage is so classed among estates at common law. But this fact does not remove the difficulty in harmonizing the common-law doctrine with the principles applicable to mortgages as they are now regarded. As between the mortgagor and mortgagee, the latter, for the purpose of enforcing his lien, may exercise many rights of ownership, but it will be remembered that these rights are exercised to the end that the security may be enforced, and not because the mortgagee is vested with the ownership of the land.

Our conclusion is, that the interest of the mortgagor in the lands is an estate of inheritance, which is in no way affected by the mortgage before entry and foreclosure, further than by the lien created. These views are, in their application to this case, strengthened by the language of chapter 108, section 2, Revised Statutes 1843, page 442, under which the mortgage in question was executed. It provides that mortgages upon real property shall operate as liens from the date of their filing for record. This provision may be interpreted as a legislative declaration of the law as then understood, to the effect that the interest held by a mortgagee in the land is no other or greater than a lien.

A question is presented as to the effect, upon the titles and interests of the parties, of an entry under the mortgage after forfeiture for conditions broken. No additional right is conferred upon the mortgagee because entry on account of the default of the mortgagor is authorized by the instrument; under the law, without such a provision, the right existed. Whatever effect an entry may have, and we need not, as will presently appear, examine that question, it is our opinion that after having been made its effects may be waived. There can be no doubt on this point upon principle, namely: After entry, if the possession of the land be restored to the mortgagor upon his claim of ownership, it is very clear that this would operate to waive the rights acquired by the mortgagee. This doctrine has the support of authority. *Botham v. McIntire*, 19 Pick. 346; *Charles v. Dunbar*, 4 Met. 498.

The instructions to the jury given by this court are in harmony with the foregoing views. In effect they hold that the defendant, claiming under the mortgage, did not, without entry, acquire title to the land. The jury were required to find the fact of entry, and, if found, the further fact of waiver thereof, by instructions which are not objectionable. Nor do we understand defendant's counsel to complain of them, further than by their conformity to the doctrines above announced.

*Affirmed.*¹

¹ Compare: *Mack v. Wetzler*, 39 Cal. 247; *Townsend v. Peterson*, 12 Col. 591; *Johnson v. Sayre*, 24 Fla. 1; *Vason v. Ball*, 56 Ga. 278; *Kelley v. Leachman*, 2 Idaho, 112; *Harrington v. Foley*, 158 Ia. 287; *Waterson v. Devoe*, 18 Kans. 223; *Duckland v. Rousseau*, 2 La. Ann. 168; *Dawson v. Peter*, 119 Mich. 274; *Rice v. R. R.*, 24 Minn. 464; *Clark v. Trust Co.*, 59 Neb. 53; *Trimm v. Marsh*, 54 N. Y. 599; *Walker v. Johnson*, 37 Tex. 127; *Burkman v. Jones*, 44 Wis. 498. — ED.

CARUTHERS v. HUMPHREY.

SUPREME COURT, MICHIGAN, 1864.

[12 Mich. 270.]

CHRISTIANCY, J. The bill was filed to foreclose two mortgages (on the same land) executed by the defendants to William L. Coonley, both dated the fifth day of June, 1890; one for four hundred and twelve dollars and the other for two hundred dollars: both payable one year from date with interest at ten per cent. The former was assigned to complainant on the day of its date, and the latter on the sixteenth day of May, 1862, long after it became due. The mortgages were respectively accompanied by a promissory note for a like amount, payable in the same way, which notes were transferred to complainant with the respective mortgages.

The defence set up is usury, and a tender of the amount actually due, after default, and before the filing of the bill.

It is clearly proved, and the fact is not disputed, that, on the twenty-eighth day of July, 1862, Humphrey tendered to complainant the full amount due on the two mortgages, exclusive of the *bonus* in each case, and the interest thereon — in other words, exclusive of what we have found to be usury. This tender was refused by complainant, and Humphrey, with full notice to complainant, deposited the money on the same day with a Mr. Simonson, near complainant's residence, to be paid to complainant when he should choose to receive it. But the money was not brought into court, nor does it appear by the evidence that the tender was kept good up to the time of the hearing, though it is shown to have been still in Simonson's hands when the evidence was taken.

The naked question, therefore, is, whether the tender alone, made after default, or failure to pay on the day when due, had the effect to discharge the mortgages, or release the land from their encumbrance.

We think this question must be answered in the affirmative.

A mortgage is no longer in this State what it was originally at common law, a grant of the land to the mortgagee, defeasible upon condition subsequent, and to become absolute on failure to pay at the specified day. It is but a security for the debt. The estate in the land is still in the mortgagor: and payment at any time before foreclosure or sale, or (in case of foreclosure by advertisement) at any time before the expiration of the time of redemption — including, of course, any legal costs which may have been made — will discharge the mortgage in the same manner as if made on the day of payment mentioned in the mortgage; and no re-conveyance is necessary to vest the title in the mortgagor, in the one case more than the other.

The mortgage, therefore, is but a lien upon the land as security for the debt; and, so far as relates to the effect of a tender, we think this lien is precisely analogous to that of a lien upon, or a pledge of, goods as

security for a debt. And in such case it is well settled that, while a tender of the amount due does not, without acceptance, extinguish the debt, nor release the debtor from personal liability, it extinguishes the lien, and the creditor loses his right to all collateral securities. See *Moynahan v. Moore*, 9 Mich. 9.

We have been saved the labor of a full discussion of this question, by the decision of the same question here involved by the Court of Appeals in New York, in *Kortright v. Cady*, 21 N. Y. 343. And in the able opinions of Davies and Comstock, Judges, given in that case, we fully concur.

We think, therefore, the lien of the mortgage was wholly discharged by the tender; and that complainant can look only to the personal responsibility of his debtor. And, this being a proceeding to foreclose — or, in other words, to enforce the lien of the mortgages, the court below was right in dismissing the bill, and the decree of that court must be affirmed, with costs.

The other justices concurred.¹

CHAPPELL *v.* JARDINE.

SUPREME COURT, CONNECTICUT, 1883.

[51 Conn. 64.]

SUIT for a foreclosure; brought to the Superior Court. The defendants demurred to the complaint; the court (ANDREWS, J.) overruled the demurrer and passed a decree of foreclosure. The defendants appealed to this court. The case is sufficiently stated in the opinion.

PARK, C. J. This is a suit for the foreclosure of certain mortgaged premises, constituting an island, known as Ram Island in Long Island Sound. The complaint alleges that the land mortgaged, at the time the deed was given, lay in the town of Southhold, Suffolk County, in the State of New York, and it is averred that the mortgage was recorded in the office of the clerk of Suffolk County in that State. It is further alleged that Ram Island, by the recent establishment of the boundary line between the State of New York and this State, has become a part of the town of Stonington in this State. The complaint is demurred to, so that the averment stands admitted that the island was, when the mortgage was made, a part of the State of New York.

The mortgaged premises having been in the State of New York when the mortgage was made, it is of course to be governed in its construction and effect by the laws of that State then in force. In *McCormick*

¹ Compare: *McMillan v. Richards*, 9 Cal. 365; *Ledyard v. Chapin*, 6 Ind. 320; *Howard v. Gresham*, 27 Ga. 347; *Le Beau v. Glaze*, 8 La. Ann. 474; *Renard v. Clink*, 91 Mich. 1; *Thornton v. Exchange Bank*, 71 Mo. 221; *Griffin v. Lovell*, 42 Miss. 402; *Kortright v. Cady*, 21 N. Y. 343; *McClung v. Trust Co.*, 137 Mo. 106; *Salinas v. Ellis*, 26 S. C. 337; *Brertenbach v. Turner*, 18 Wis. 140. — ED.

v. Sullivant, 10 Wheat. 192, the court say: "It is an acknowledged principle of law that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another." The same doctrine is held in *United States v. Crosby*, 7 Cranch, 115, *Kerr v. Moon*, 9 Wheat. 565, *Darby v. Mayer*, 10 id. 465, and in many other cases. Indeed the doctrine is unquestioned law everywhere.

Now, according to the laws of the State of New York then and still in force, a mortgage of real estate creates a mere chose in action, a pledge, a security for the debt. It conveys no title to the property. The claim of the mortgagee is a mere chattel interest. He has no right to the possession of the property. The title and seisin remain in the mortgagor, and he can maintain trespass and ejectment against the mortgagee, if he takes possession of the property without the consent of the mortgagor. This appears clearly from the following cases:

In *Gardner v. Heartt*, 3 Denio, 232, the court say: "The mortgagee, as such, has no title to the land mortgaged; he has neither *jus in re* nor *ad rem*, but a mere security for his debt; the title to the land, notwithstanding the mortgage, remains in the mortgagor." In *Power v. Lester*, 23 N. Y. 527, the court say: "A mortgage is a mere security, an encumbrance upon land. It gives the mortgagee no title or estate whatever. The mortgagor remains the owner, and may maintain trespass even against the mortgagee. A mortgage is but a chattel interest; it may be assigned by delivery, and cannot be seized and sold on execution." In *Trimm v. Marsh*, 54 N. Y. 599, the court say: "The common law rule . . . still prevails in England. There the courts still hold that the legal title passes to the mortgagee, and becomes by default absolutely vested in him at law, and that the mortgagor has, after default, nothing but an equity of redemption to be enforced in a court of equity. After default the mortgagor can again become re-invested with the title to his land only by a re-conveyance by the mortgagee. The same rule prevails in the New England States, and in many of the other States of the Union. But this common law rule has never, to its full extent, been adopted in this State. Here the mortgagor has, both in law and equity, been regarded as the owner of the fee, and the mortgage has been regarded as a mere chose in action, a mere security of a personal nature.

It follows, therefore, that while the land in question remained in the State of New York it was encumbered by a mortgage of this character; and when it came into this State it bore with it the same burden precisely. There was nothing in the change of jurisdiction that could affect the contract of mortgage that had been made between the parties. The title to the property continued to remain in the mortgagor, and it remains in him still. This is clear. The laws of this State could not make a new contract for the parties or add to one already made. They had to take the contract as they found it.

Now it is clear that there is no remedy by way of foreclosure known to our law which is adapted or appropriate to giving relief on a mortgage of this character. Our remedy is adapted to a mortgage deed which conveys the title of the property to the mortgagee, and when the law day has passed the forfeiture, stated in the deed, becomes absolute at law, and vests a full and complete title in the mortgagee, with the exception of the equitable right of redemption, which still remains in the mortgagor. The object of the decree of foreclosure is to extinguish this right of redemption if the mortgage debt is not paid by a specified time. The decree acts upon this right only. It conveys nothing to and decrees nothing in the mortgagee if the debt is not paid. After the law day has passed the right of redemption becomes a mere cloud on the title the mortgagee then has, and when it is removed his title becomes clear and perfect. *Phelps v. Sage*, 2 Day, 151; *Roath v. Smith*, 5 Conn. 136; *Chamberlin v. Thompson*, 10 id. 244; *Porter v. Seeley*, 13 id. 564; *Smith v. Vincent*, 15 id. 1; *Doton v. Russell*, 17 id. 146; *Cross v. Robinson*, 21 id. 379; *Dudley v. Caldwell*, 19 id. 218; *Colwell v. Warner*, 36 id. 224.

What effect would such a decree produce upon a mortgage like the one under consideration, where the legal title remains in the mortgagor, and nothing but a pledgee's interest is in the mortgagee, even after the debt becomes due? It could only extinguish the right of redemption, if it could do that. It could not give the mortgagee the right of possession of the property, for the mortgagor has still the legal title, which carries with it the right of possession. It would require another proceeding in equity, to say the least, to dispossess him of that title, and vest it in the mortgagee. Hence it is clear that full redress cannot be given the plaintiff in this proceeding.

But the plaintiff has a lien on the property in the nature of a pledge to secure payment of the mortgage debt. And although our remedy of strict foreclosure may not be adapted to give redress to the plaintiff through the medium of such a lien, still a court of equity can devise a mode that will be appropriate; for it would be strange if a lawful lien upon property to secure a debt could not be enforced according to its tenor by a court of chancery. It is said that every wrong has its remedy; so it may be said that every case requiring equitable relief has its corresponding mode of redress. We have no doubt that a court of equity has the power to subject the property in question to the payment of this debt, upon a proper complaint adapted to the purpose. When personal property is pledged to secure the payment of a debt, it may be taken and sold, that payment may be made, after giving the pledgor a reasonable opportunity for redemption. So here, we think a similar course might be taken with this property. Such a course would fall in with the original intent of the parties, and with the civil code and mode of procedure of the State of New York. Modes of redress in that State have of course no force in this State, but such a mode of procedure seems to be adapted to a case of this character.

And we further think that on an amended complaint, setting forth all the essential facts, and praying that if there shall be a default in redeeming the property during such time as the court shall allow for redemption, then the right of redemption shall be forever foreclosed, and the legal title and possession of the property be decreed in the mortgagee, such course might be taken.

We think either of the modes suggested might be pursued; but inasmuch as the course which has been taken leaves the legal title and possession of the property in the mortgagor, we think the court erred in holding the complaint sufficient, and in passing the decree thereon.

There is error in the judgment appealed from, and it is reversed, and the case remanded.

In this opinion the other judges concurred.¹

ROSS v. BROMSTEAD.

COMMON PLEAS, 1622.

[*Benloe*, 144.]

TRESPASS for taking his horse in Cheapside. Defendant pleaded that he is hostler of such an inn, and that the plaintiff was in debt to him in such a sum for hay and provender for the said horse, and also for board of the plaintiff; and that the defendant on such a day demanded the said sum from the plaintiff; and that the plaintiff agreed that the defendant might keep the said horse in his possession until the defendant should be paid the said sum by the plaintiff; and that after that the plaintiff placed the said horse in the possession of the defendant until the defendant should be paid the said sum by the plaintiff; afterward the plaintiff took the said horse from the possession of the defendant, the said sum not having been paid; and that, therefore, the

¹ MORTGAGEE HAS A LEGAL TITLE: *Fields v. Clayton*, 117 Ala. 538; *Reynolds v. Bank*, 30 Ark. 520; *Rockwell v. Braddley*, 2 Conn. 5; *Hall v. Truenell*, 1 Houst. (Del.) 320; *Carroll v. Balance*, 26 Ill. 9; *Wilkins v. French*, 20 Me. 111; *Sumwalt v. Tucker*, 34 Md. 89; *Erskine v. Townshend*, 2 Mass. 468; *Brown v. Cram*, 1 N. H. 169; *Saunderson v. Rice*, 21 N. J. L. 639; *Hemphill v. Ross*, 66 N. C. 477; *Tryon v. Munson*, 77 Pa. 250; *Carpenter v. Carpenter*, 6 R. I. 542; *Henshaw v. Wells*, *Humph.* 568; *Walker v. King*, 44 Vt. 601; *Faulkner v. Brockenborough*, 4 Rand. (Va.) 245.

MORTGAGEE HAS A LEGAL LIEN: *Dutton v. Warschauer*, 21 Cal. 609; *Pueblo R. R. v. Beshoer*, 8 Col. 32; *McMahon v. Russell*, 17 Fla. 698; *Ragland v. Justices*, 10 Ga. 65; *Morton v. Noble*, 22 Ind. 160; *Chick v. Willets*, 2 Kans. 384; *Taliaferro v. Gay*, 78 Ky. 496; *Miller v. Shotwell*, 38 La. Ann. 890; *Trust Co. v. Lumber Co.*, 103 Mich. 392; *Berthold v. Fox*, 13 Minn. 501; *Hill v. Robertson*, 24 Miss. 368; *Bank v. Bell*, 8 Mont. 32; *Webb v. Hasselton*, 4 Neb. 308; *Hyman v. Kelly*, 1 Nev. 179; *Runyan v. Mercereau*, 11 Johns. (N. Y.) 534; *Guano Co. v. Richardson*, 26 S. C. 401; *Mann v. Taecon*, 25 Tex. 221; *Syder v. Parker*, 19 Wash. 276; *Slaughter v. Richards*, 97 Wis. 184. — ED.

defendant retook the said horse as well he might. The plaintiff demurred.

CHAMBERLYN, J. It seems to me that the plea is insufficient, for the defendant has no property in the horse by the agreement that he may keep it, &c., but only a possession like a bailee, as though he might keep a bird until he was satisfied, &c., he lets it fly at his peril for he may not retake it.

LEY, C. J. To the contrary, for the agreement is a pledge of the horse which amounts to a conditional sale, for just as one may mortgage his land, so one may pledge his goods, and that vests a conditional property, by virtue of which he may retake the horse in whatever place he may find it. See 5 Hen. VII., 1, where a pledge must be pleaded as a pledge, but a license to take it is not a pledge until it is delivered; but 9 Hen. VII., 46, *Vavasor* that since he was a sergeant it was adjudged that if one pledged goods to me for money and brought detainee against me and I plead *riens detinet*, it would be found against me, because the property remains in him.¹

TUCKER v. WILSON.

HOUSE OF LORDS. 1714.

[1 P. Wms. 260.]

ONE possessed of an exchequer annuity for ninety-nine years, borrowed money upon it, and for securing this money, there was an absolute transfer of the annuity, but with a defeasance, that if the money were paid at such a day, the assignment should be void.

The money was not paid at the day; upon which the lender frequently desired the money, and gave notice that he would sell, and appointing a time for that purpose desired the borrower to be present to see that the annuity was sold at the full value.

The borrower, by letter, desired that the lender would stay a week longer before he sold, which was also complied with; and then the lender dying suddenly, the defendant, his administrator, sold the annuity at the exchange, by a sworn broker, for the full value that those annuities then sold for, and which was less than what the money due to the defendant amounted unto.

¹ Compare: *Casey v. Cavaroc*, 96 U. S. 467; *Ex parte Fitz*, 2 Lowell, 519; *Wright v. Ross*, 36 Cal. 414; *Robertson v. Wilcox*, 36 Conn. 426; *Bank v. Nelson*, 38 Ga. 391; *Atkinson v. Foster*, 134 Ill. 472; *Raper v. Harrison*, 37 Kan. 243; *Foltier v. Schoyer*, 19 La. Ann. 17; *Textor v. Orr*, 86 Md. 392; *Winchester v. Ball*, 54 Me. 558; *McMullan v. Dickinson Co.*, 63 Minn. 405; *Thompson v. Dolliver*, 132 Mass. 103; *Donnell v. Wyckoff*, 49 N. J. L. 48; *Brown v. Bement*, 8 Johns. 96; *Wallcott v. Keith*, 22 N. H. 196; *McCoy v. Lassiter*, 95 N. C. 88; *McCready v. Haslock*, 3 Tenn. Ch. 13; *Luckett v. Townsend*, 3 Tex. 119; *Geilpess v. Corrigan*, 95 Wis. 651; *Williams v. Gillespie*, 30 W. Va. 586; *Connor v. Carpenter*, 28 Vt. 237. — Ed.

These annuities afterwards rose in value ; whereupon the mortgagor brought a bill to redeem, or to compel the defendant to purchase another annuity on the same fund, and of the same yearly value, to be transferred to the mortgagor, on his payment of principal and interest.

LORD CHANCELLOR. Here is no express power to sell ; and annuities for ninety-nine years are like rent-charges out of lands, and not like stocks, which may be thought to be of imaginary value ; and there being no decree for foreclosing the mortgagor, nor any agreement in writing, that the mortgagee should sell ; let the defendant procure an annuity of the like value, and upon the same fund, to be conveyed to the plaintiff upon his payment of the principal and interest to the defendant ; and let the master compute what is due for principal and interest.

From which decree an appeal was brought in the House of Peers, where it was insisted, that these exchequer annuities, as well as stocks, were usually sold at the exchange, and that this was but as a pawn ; and though there was no express power to sell in the defeasance, yet by the mortgagor's letter, it was plainly submitted to, when the mortgagor desired the sale might be deferred for a week ; that the convenience of these securities, among merchants, was, that after the day of payment past, they were taken to be ready money ; and that it would be infinitely troublesome, and dilatory, if there could be no sale of such annuities thus pledged, without a decree of foreclosure ; that this would set aside several sales that had been made in the like cases, and occasion multiplicity of suits ; that the case here was the stronger, it being that of an administrator, who was obliged to dispose of the assets of the intestate to pay his debts and legacies.

Wherefore the decree was reversed by the Lords *nemine contradicente*.¹

NOYES, RESPONDENT, v. WYCKOFF, APPELLANT.

SUPREME COURT, NEW YORK, 1883.

[30 Hun, 466.]

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

The action was brought to recover damages for the conversion of a quantity of iron ore. The defendant justified the taking under a chat-

¹ Compare : *Prothomer v. Dawson*, Holt N. P. 385 ; *Martin v. Reed*, 11 C. B. n. s. 701 ; *Sharpe v. Bank*, 87 Ala. 644 ; *Bendel v. Ice Co.*, 82 Cal. 199 ; *Robertson v. Wilcox*, 36 Conn. 426 ; *Morgan v. Dodd*, 3 Col. 551 ; *Robinson v. Hurley*, 11 Ia. 410 ; *Joliet Co. v. Scioto Co.*, 82 Ill. 348 ; *Goldsmith v. Church*, 25 Minn. 202 ; *Cattle Co. v. Trust Co.*, 149 Mass. 492 ; *Vaupell v. Woodward*, 2 Sandf. Ch. 143 ; *Glidden v. Bank*, 53 Ohio St. 588 ; *Earl v. Grant*, 14 R. I. 228 ; *King v. Texas Co.*, 58 Tex. 669 ; *Alexander Co. v. Burke*, 22 Gratt. 254. — ED.

tel mortgage given by a former owner, and the plaintiff claimed under a bill of sale subsequently executed by the mortgagor. The plaintiff claimed that the lien of the mortgage was destroyed by a tender made by him.

With reference to this the court at General Term said: "The conversion rests upon a subsequent tender by the owner of the mortgage equity. Mrs. Fitzgerald gave the mortgage and it was collateral to the note. The plaintiff bought the equity with full knowledge of the mortgage and in express terms subject to it. His tender fails for two reasons: First. The mortgage is a part of the consideration, and the property was taken subject to its payment, although there was no express covenant to pay the mortgage debt in the bill of sale. Second. A stranger to the title cannot make a tender and destroy the lien. A tender leaves the debt. Mrs. Fitzgerald must pay her note if this tender is good. A tender by the owner of the equity is not good as against the interests of the mortgagee. *Harris v. Jex*, 66 Barb. 232. A chattel or personal mortgage differs in its structure and effect entirely from a mortgage upon real estate. The real estate mortgage is only a lien and conveys no title whatever. The personal mortgage transfers the title at once subject to a defeasance by the performance of the condition annexed. A tender before or after due, by the owner of the equity, would not destroy the lien. There is strictly speaking no lien. There is a transfer of title; and only by keeping the tender good can the property be held free of the mortgage."

The judgment should be reversed, and a new trial granted, costs to abide event and order of reference vacated.

Opinion by BARNARD, P. J.; DYKMAN, J., concurred; PRATT, J., dissented.

*Judgment reversed, and new trial granted, costs to abide event, order of reference vacated.*¹

RANDALL v. PERSONS.

SUPREME COURT, NEBRASKA, 1894.

[42 Neb. 608.]

RAGAN, C. This is an action of replevin brought in the District Court of Hall County by Carl M. Persons against M. Randall. Persons alleged in his petition that he was the owner of and entitled to the immediate possession of the property replevied, the same being "an office

¹ Compare: *Brown v. Lipscomb*, 9 Port. 472; *Horn v. Reitter*, 12 Col. 310; *Heyland v. Badger*, 35 Cal. 404; *Willard v. Worthman*, 84 Ill. 446; *Remmer v. Bloom*, 65 Ia. 563; *Herman v. Henry*, 32 Kans. 49; *Sumner v. Batchelor*, 30 Me. 35; *Weeks v. Baker*, 152 Mass. 20; *Gale Co. v. Phillips*, 78 Mich. 86; *Blake v. Corbett*, 120 N. Y. 327; *Chapman v. Hunt*, 18 N. J. Eq. 414; *Leighton v. Shepley*, 8 N. H. 359; *Humbolt v. Blackburn*, 16 Ore. 153; *Blodgett v. Blodgett*, 48 Vt. 32. — Ed.

chair." The answer of Randall was a general denial. Persons had a verdict and judgment, and Randall brings the case here for review.

The evidence in the bill of exceptions establishes, and tends to establish, the following facts: Persons sold the property and other property of one Meth, taking the latter's note for the purchase price of the property and a chattel mortgage thereon to secure the payment of the note. This mortgage, or a copy of it, was duly filed in the office of the county clerk of Hall County, where the property was situate. Persons afterwards sold and indorsed Meth's note to a bank in Grand Island, and the note not being paid at maturity, the bank sued Meth, and Persons as an indorser thereon, and obtained judgment against them for the amount of the note in suit. Persons then paid the amount of this judgment and interest to the bank, and he and Meth entered into an agreement, the substance of which was that the contract of sale of the property between Meth and Persons should be and was rescinded, the title to the property reinvested in Persons, and Meth was to pay Persons a small sum of money. The property, however, was not at this time removed from the place of business or office of Meth, where it was when the agreement between him and Persons was made. Soon after this time an execution was levied upon this property by one of Meth's judgment creditors, and the property in controversy, and other property, was, by the consent of Meth and the execution creditor, sold to Randall, he paying the agreed price thereof to the attorney of the execution creditor. We say that the evidence in the record establishes, and tends to establish, the foregoing facts, for the evidence as to nearly all of these facts was conflicting.

On the trial to the jury Persons, against the objection of Randall, was permitted to read in evidence to the jury the note and chattel mortgage executed by Meth to him upon the property in controversy, and this is the first error assigned here. It is to be remembered that Persons, in his petition, alleged in himself an absolute ownership of the property. The legal title to property pledged by a chattel mortgage remains in the mortgagor until divested by foreclosure proceedings and sale in pursuance of law, and until the title of the mortgagor is thus divested, the mortgagee has merely a lien upon the property. In replevin, as in all other actions, the evidence should correspond to the allegations in the pleadings; and where a plaintiff in an action of replevin bases his right to the possession of the property claimed by reason of a special ownership therein or lien thereupon, he should set out in his petition the facts with reference to such special ownership or lien. *Haggard v. Wallen*, 6 Neb. 271; *Musser v. King*, 40 Neb. 892. The note and chattel mortgage, then, introduced in evidence in this case were irrelevant under the issues made by the pleadings, and did not tend to prove Persons' case.

Throughout the trial counsel for Persons laid great stress upon the fact of the existence of record of the chattel mortgage on this property made by Meth; and there is evidence in the record which tends to show

that Randall had actual knowledge of the existence of this mortgage, but whether he had such actual knowledge, he was bound by the notice which the record imparted, and of course could not be an innocent purchaser of this property as against the holder of said chattel mortgage, if in force. There is no doubt but that the admission in evidence of the note and chattel mortgage was error. The difficulty in the case is to determine whether this error was prejudicial to Randall. There is evidence enough in the record, if believed by the jury, to sustain a finding that Persons was the absolute owner of this property at the time he brought this suit by virtue of the contract between him and Meth, by which the sale of the property to the latter was rescinded; but we cannot say certainly whether the verdict of the jury, that "at the time of bringing said action the said plaintiff was entitled to the possession of said property," was based upon their finding that the absolute title to the property was in Persons by reason of the said contract of rescission between him and Meth, or whether the jury's verdict was predicated upon the note and chattel mortgage introduced in evidence. For that reason we think the admission in evidence of the note and chattel mortgage was prejudicial error. If Mr. Persons made the contract with Meth, which he alleges he did, rescinding the sale of the property previously made to Meth, then, of course, that operated as a satisfaction of the note and mortgage, as the note had been reduced to judgment, and was then owned by Persons; and if Mr. Persons based his title to this property upon its repurchase from Meth, it is difficult to understand why he insisted upon also claiming possession of the property, by virtue of the note and chattel mortgage. The two theories were inconsistent. If he owned the property, as he pleaded he did, the chattel mortgage had nothing whatever to do with the case. If he did not own the property and claimed special ownership in it by virtue of the chattel mortgage, then he should have pleaded the facts, and apprised the defendant of just what his claims on the property were; and had he done so, then all his testimony as to his being the absolute owner of the property because of the said contract of rescission of its sale made between him and Meth would have been irrelevant under the issues. A litigant cannot plead one thing and prove another. He cannot plead that he is the absolute owner of property, and satisfy such plea by proof that he simply has a lien upon it; nor can he plead that he is entitled to the possession of property by virtue of a lien upon it and satisfy such plea by proof that he is the absolute owner of the property. The judgment of the District Court is reversed and the cause remanded.

*Reversed and remanded.*¹

¹ Compare: *Nichols v. Hampton*, 46 Ga. 253; *Flanders v. Chamberlain*, 24 Mich. 305; *Moore v. Norman*, 43 Minn. 438; *Knowles v. Herbert*, 11 Ore. 240; *Preston v. Carter*, 80 Tex. 388; *Byrd v. Forbes*, 3 Wash. 308. — Ed.

HALLIDAY v. HOLGATE.

EXCHEQUER CHAMBER, 1868.

[*L. R. 3 Ex. 299.*]

WILLES, J. We are all of opinion that this judgment must be affirmed. The action is brought by an assignee in bankruptcy to recover the value of certain scrip certificates of the bankrupt, alleged to have been converted by the defendant. The defendant was under advances to the bankrupt, in respect of which the bankrupt pledged to the defendant the certificates in question. The bankrupt became in default, and absconded, and the defendant thereupon sold a part of the certificates sufficient to repay the whole or part of the amount due to him. The assignee seeks to recover either the whole value or nominal damages in respect of the wrong done by the sale. As to the claim for the whole value, it is certainly a strong contention. The scrip certificates were in the hands of the defendant as a security for money due, and the assignee has sustained no actual damage, for the debt could have been paid no otherwise, yet the assignee seeks to recover the whole value as if at the time the certificates were his own. It does not require much argument to show that there is no principle for such a rule, and we should not be disposed to act upon it unless we are compelled by some authority to do so. But the authorities invite us to do the reverse, for *Johnson v. Stear* shows that if any action lies at all in such a case, the verdict can only be for nominal damages, and that an allowance must be made for the amount of the debt which has been thus satisfied, that being the amount which the pledgor or his assignee would have had to pay before he could have required the article to be delivered up. We are quite satisfied to abide by that decision.

But it has been argued that the plaintiff is at any rate entitled to nominal damages, for that a conversion was committed by the sale of the certificates. That sale, it is contended, had the effect of putting an end to the bailment of pledge; the property of the pledgee was thereby determined, so as to enable the assignee to say that at the moment when the sale took place he became entitled to the certificates by virtue of the general property which then reverted in him. This reasoning proceeds upon a somewhat subtle and narrow ground, for it is admitted that the assignee could only claim nominal damages. But we cannot arrive at the conclusion that he is so entitled without getting rid of the case of *Donald v. Suckling*; and so far from feeling disposed to overrule that case, we are satisfied of its good sense, and think that it puts the whole matter on a plain and intelligible footing. There are three kinds of security: the first, a simple lien; the second, a mortgage, passing the property out and out; the third, a security intermediate between a lien and a mortgage, viz., a pledge — where by contract a deposit of goods is made a security for a debt, and the right to the

property vests in the pledgee so far as is necessary to secure the debt. It is true the pledgor has such a property in the article pledged as he can convey to a third person, but he has no right to the goods without paying off the debt, and until the debt is paid off the pledgee has the whole present interest. If he deals with it in a manner other than is allowed by law for the payment of his debt, then, in so far as by disposing of the reversionary interest of the pledgor he causes to the pledgor any difficulty in obtaining possession of the pledge on payment of the sum due, and thereby does him any real damage, he commits a legal wrong against the pledgor. But it is a contradiction in fact, and would be to call a thing that which it is not, to say that the pledgee consents by his act to revest in the pledgor the immediate interest or right in the pledge, which by the bargain is out of the pledgor and in the pledgee. Therefore, for any such wrong an action of trover or of detinue, each of which assumes an immediate right to possession in the plaintiff, is not maintainable, for that right clearly is not in the plaintiff. The judgment must, therefore, be affirmed.

*Judgment affirmed.*¹

IN RE ROLLASON.

CHANCERY DIVISION, 1887.

[34 Ch. D. 495.]

THE defendant in this action was sued as the executrix of her deceased husband, a pawnbroker. Judgment was given on trial for the plaintiff on the 21st of July, 1886, for £100 interest and costs. On the 19th of November, 1886, a writ of *fi. fa.* was issued for the amount of taxed costs. Execution was levied on the 20th of November, 1886, and the sheriff seized, *inter alia*, redeemable pledges received in the business of the deceased.

One Twist obtained judgment against the defendant in an action in the Queen's Bench Division on a money claim against the defendant to this action in respect of her deceased husband's business. A receiver of the business of the deceased was appointed in the Queen's Bench action, subject to his giving security. His appointment was perfected by his giving security on the 25th of November, 1886. The receiver served notice on the sheriff that he claimed the redeemable pledges.

This was an interpleader summons on the part of the sheriff.

¹ Compare: *Donald v. Suckling*, L. R. 1 Q. B. 585; *Ex parte Receiver*, 18 Q. B. D. 222; *Talty v. Freedman's Trust Co.* 93 U. S. 321; *Williams v. Ashe*, 111 Cal. 180; *Cumnock v. Institution*, 142 Mass. 342; *Drake v. Coolan*, 99 Mich. 121; *Reardon v. Patterson*, 19 Mont. 231; *Goss v. Emerson*, 23 N. H. 38; *Lewis v. Mott*, 36 N. Y. 395; *Thompson v. Patrick*, 4 Watts, 44. — Ed.

NORTH, J. The sheriff took possession on the 20th of November of the premises connected with the business carried on by the defendant. On the 25th the receiver, under a judgment obtained in another action, perfected his security; and would have been entitled to take possession of the assets on the premises if all prior claims were out of the way. A prior claim in the way was the claim of the sheriff. The sheriff, having seized, had taken possession, amongst other things, of a number of goods in pledge: in which, therefore, the pawnbroker had a qualified property. As to some of the pledges, more than twelve months and a week had expired and some of the goods were irredeemable. As to others less than twelve months had expired. It is conceded that the sheriff could not be compelled to go out of possession of those articles which had been pledged for more than twelve months. It is admitted that he is entitled to remain in possession of the other goods also unless the appointment of the receiver has intercepted his rights. It is not disputed that if they remain in his possession until the time for redemption expires, the sheriff will have an interest in the property. It is clear to me that the sheriff has in the mean time also an interest in the goods; which are held as security for the money advanced on them, and to secure which the goods were pledged. When I say it is a security, I do not think it is within 1 & 2 Vict. c. 110, s. 12, which, I think, means only securities *ejusdem generis*, as the securities particularly mentioned in the section. And I doubt whether the section can be held to apply to goods in pledge. But independently of that, the sheriff has a right to the possession of the goods in respect of the qualified property the pawnbroker has in them: and he has a right to sell them when the twelve months and a week shall have expired, and to make a good title to any one to whom he sells, and has a right to receive the money; and in respect of the redeemable pledges it appears to me the appointment of the receiver has not intercepted his right; and the sheriff has a right to hold the goods by way of deposit, and they cannot be redeemed except by payment of the money secured by the pawners, and the person for whom the sheriff holds the goods is entitled to any money paid for redemption.

As there are no facts in dispute, under Order LVII., rule 9, I can deal with the matter at once, without directing an issue, and declare that the receiver is not entitled to the pledges.¹

¹ Compare: *Mores v. Conham*, Owen, 123; *Hobson v. Astley*, 2 Moo. & Rob. 342; *Squire v. Huetson*, 1 Q. B. 358; *Warner v. Martin*, 11 How. 209; *Whitney v. Ray*, 24 Ark. 22; *Brittan v. Bank*, 124 Cal. 282; *Stearns v. Bates*, 46 Conn. 306; *Hawkins v. Bank*, 150 Ind. 117; *Rand v. Barrett*, 66 Vt. 731; *Drake v. Cloonan*, 99 Mich. 121; *Boswell v. Stugpen*, 75 Miss. 308; *Waddle v. Owen*, 43 Neb. 489; *Bailey v. Colby*, 34 N. H. 29; *Bennett v. Austin*, 81 N. Y. 308; *Ashston's Appeal*, 73 Pa. St. 153; *Bullar v. Billings*, 2 Vt. 309. — Ed.

VAN ARSDALE v. JOINER.

SUPREME COURT, GEORGIA, 1871.

[44 Ga. 173.]

MCCAY, J. In one view of this case, it is all for the defendant in error. If the watch was hers, and her husband had no authority from her to pledge it, then it is clear that she has a full right to recover its full value, with interest from the date at which the value is ascertained. But there was some evidence before the jury that she had authorized her husband to raise money on the watch. This would clearly confer on him the power to pawn it as security for the money; and the defendant in the suit had the right to have the law, in this aspect of the case, presented to the jury. In this aspect of the case, her rights depend upon the fact that the husband was her agent, and she is bound by all his conduct within the scope of his authority. It is a fact that he did not represent himself as an agent, but treated the watch, as well as the contract he was making, as his own. This he had no authority to do. The best that can be said for the plaintiff in error, is, that if the husband had authority to pledge, then the pawnee got every right that authority clothed him with power to confer, just as though he had acted avowedly as the agent of the wife. Code, section 2178. Suppose he had done this. Suppose he had told the pawnee the truth. "This is my wife's watch, and she has authorized me to raise money on it." Can it be contended that the pawnee was not bound to inquire into the extent of the power? Would not the law be clear that the authority would only authorize a pawn in the usual manner?

What is the usual mode? The pawnee advances the money, and if the debt is not paid as agreed, the pawnee may, on thirty days' notice, sell, &c. The waiver of notice is the exception (see Code, section 2112), and an exception of very doubtful policy. Indeed, as it seems to us, if the husband had frankly told the pawnee what his authority was, no prudent pawnee would, from that authority, deduce the power to waive the notice.

The agent must act within his authority reasonably construed. Code, 2158. This would be a special agency for a particular purpose, and in such cases it is the duty of one dealing with the agent to examine his authority. Code, section 2158.

We concur, therefore, with the judge, that the husband had only the right, under this authority, to pledge in the usual mode, and that any special contract, different from the usual, ordinary results growing out of a pledge, was beyond his authority.

Hence, the sale without notice was illegal; the title of the true owner was not divested. The sale was a conversion, and the right of Mrs. Joiner to sue was complete. She was not bound, as a con-

dition precedent to her right of action, to tender the money borrowed. The conversion of the property to a use adverse to that she had authorized gives her a right to sue.

But what, in such a case, is the true measure of damages? Is it the value of the watch? Has she been injured to that extent? We think not. She has elected to take damages. What damages? Surely only the damages she has suffered. If she clothed her husband with power to raise money on the watch, she has only suffered by the conversion what the watch was worth above the money her agent procured upon it. This is clearly the result of the authorities upon this question. Benjamin on Sales, 592; 15 Mass. Rep. 408.

Whilst, therefore, we concur with the judge, as to the right of Mrs. Joiner to sue for the conversion, we do not concur in his ruling as to the measure of damages, if the jury should find the husband had authority to raise money on the watch. *Judgment reversed.*¹

HICKS v. NATIONAL LIFE INSURANCE CO.

CIRCUIT COURT OF APPEALS, 1894.

[60 Fed. 690.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by Horace L. Hicks and Henry W. Taft, executors of Walter Rae, against the National Life Insurance Company. The trial court directed a verdict for defendant, and the plaintiffs bring error.

It also appeared upon the trial that, at the time of the death of the assured, one Wells held the policies by an assignment made to him in July, 1819, as collateral security for a loan made by him at that time to the assured. After the death of the assured, his executors tendered to Wells the amount due upon this loan, and tendered to the defendant the amount due it for unpaid premiums upon the policies. Wells, however, refused to accept the tender, and, for a consideration paid to him by the defendant, surrendered the policies to the defendant. The defendant knew at the time that the plaintiffs had tendered to Wells the amount due on the loan. At the close of the evidence the trial judge directed the jury to render a verdict for the defendant, and granted the plaintiffs an exception. Error is assigned of this ruling.

¹ Compare : Ratcliffe v. Davis, Cro. Jac. 244; Johnson v. Stear, 15 C. B. n. s. 330; Rush v. Bank, 71 Fed. 103; Berkley v. Welsh, 31 Conn. 339; Hallack & Co. v. Gray, 19 Col. 149; Waring v. Gaskill, 95 Ga. 731; Belden v. Perkins, 78 Ill. 449; Bank v. Boyce, 78 Ky. 42; Baltimore Co. v. Dalrymple, 25 Md. 269; Terge v. Burt, 118 Mich. 243; Neiler v. Kelley, 69 Pa. 403; Bank v. Trenholm, 12 Heisk. 520. — Ed.

² Only one point is printed. — Ed.

WALLACE, Circuit Judge. It is insisted for the defendant in error that the trial judge should have directed a verdict for the defendant because, the policies having been pledged to Wells and by him surrendered to the defendant, the plaintiffs could not maintain an action at law for the moneys due upon them. There is no merit in this position. Upon the tender to Wells of the amount due him upon the loan for which he held the policies as collateral his title was extinguished and immediately vested in the plaintiffs, and he would have been liable for the value of the policies in an action of conversion. The defendant acquired no better rights by obtaining a surrender from him, with knowledge of the facts, than he himself had. *Talty v. Trust Co.*, 93 U. S. 321. *The judgment is reversed.*¹

¹ Compare: *Stout v. Milling Co.*, 13 Fed. 402; *Gilman v. Curtis*, 66 Cal. 116; *Collins v. Dawley*, 4 Col. 138; *Hiligsverg's Succession*, 1 La. Ann. 340; *Boynton v. Payrow*, 67 Me. 587; *Heurus v. Baker*, 161 Mass. 320; *Richardson v. Ashby*, 132 Mo. 238; *Cushman v. Jewelry Co.* 78 N. Y. 365; *Grant v. Klein*, 115 Pa. 618; *Frazier v. Charleston*, 11 S. C. 486; *Cherry v. Frost*, 12 Lea, 1.—Ed.

SECTION II. — EQUITABLE MORTGAGE.

RUSSEL v. RUSSEL.

CHANCERY, 1783.

[1 *Bro. C. C.* 269.]

A LEASE having been pledged by a person (who afterwards became a bankrupt) to the plaintiff, as a security for a sum of money lent to the bankrupt [and other sums in which he was indebted to him], the pledgee brought this bill for a sale of the leasehold estate.

Mr. Lloyd, for the plaintiff, merely stated the case, and that the plaintiff had a lien upon the estate.

Mr. Kenyon, for the defendants, the assignees, insisted the plaintiff's claim was against the law of the land; for that it would be charging land without writing, which is against the 4th clause of the statute of frauds.

LORD LOUGHBOROUGH. In this case it is a delivery of the title to the plaintiff for a valuable consideration. The court has nothing to do but to supply the legal formalities. In all these cases the contract is not to be performed, but is executed.¹

MEADOR v. MEADOR.

SUPREME COURT, TENNESSEE, 1871.

[3 *Heisk.* 562.]

In Chancery at Carthage, before B. M. Tillman, Chancellor.

The bill alleged that the defendant, Joseph Meador, was in possession of the deed of W. A. Meador, late husband of complainant, and that he claimed to hold it under a parol mortgage and deposit of the deed. That he had sold the land to a co-defendant, Jones, and made him a deed, and prayed the delivery of the deed deposited, and the cancellation of the other deed as a cloud. That W. A. was dead, and Henry L. Meador, defendant, his heir at law, and defendant Duke, his administrator. The answers set up the deposit as an

¹ Compare: *Anon.*, 2 Eq. Abr. 284; *Hankey v. Vernon*, 2 Cox, 12; *Rogers v. Barrett*, 3 Esp. 102; *Ex parte Kensington*, 2 V. & B. 79; *Ex parte Langston*, 17 Ves. 230; *Bozon v. Williams*, 3 Y. & J. 150; *Ex parte Broderick*, 180 B. D. 766; *Spoke v. Whayman*, 20 Beav. 607; *Roberts v. Croft*, 24 Beav. 223; *Ex parte Smith*, 2 M. D. & De G. 587; *Lacon v. Allen*, 3 Drew. 579; *Ex parte Chippendale*, 2 Mont. & Ayr. 299; *Bank v. Caldwell*, 4 Dillon, 314; *Martin v. Bowen*, 51 N. J. Eq. 452; *Hall v. McDuff*, 24 Me. 311; *Cary v. Robinson*, 8 Mass. 159; *Rockwell v. Hoby*, 2 Sandf. Ch. 9; *Hackett v. Reynolds*, 4 R. I. 512; *Jarvis v. Dutcher*, 16 Wis. 307. — Ed.

equitable mortgage, and, by way of cross bill, asks "if no lien exists," a sale of the land and the application of the fund to the payment of the debts of defendant.

The decree below, reciting that it appearing that the deed "was delivered to the said Joseph Meador by the said W. A. Meador, deceased, intending thereby to secure the said Joseph Meador for his liabilities as security, and otherwise, of the said W. A. Meador, deceased;" declared that the delivery of the deed of W. A. Meador to defendant Joseph Meador did not create a lien or mortgage on the land in favor of Joseph Meador, and that complainant was entitled to dower and the residue of the fund, subject to the payment of all just debts outstanding—it adjudged that the title to the land was "in the heirs of W. A. Meador, deceased, and that the deed from Joseph Meador to his co-defendant, was void, and a cloud upon the title of the heirs at law of W. A. Meador, deceased, and shall be for naught held."

From this decree the defendants appealed.

TURNER, J., delivered the opinion of the court.

The delivery by a debtor to his creditor, of a deed made to the debtor for land, upon the agreement and understanding between the debtor and creditor that the creditor is to hold the deed as security or indemnity for debts due from the debtor or for which the creditor is bound as surety for the debtor, creates no lien or mortgage, legal or equitable, upon the land embraced in the deed.

A contrary holding would be a judicial repeal of our statutes of frauds and perjuries, making void, sales not evidenced by writing, of lands, tenements, or hereditaments.

Affirm the decree, and remand the cause for the assignment of dower and account for rents and profits.¹

HERMANN v. HODGES.

CHANCERY, 1873.

[*L. R. 16 Eq. 18.*]

THIS was a suit for specific performance of an agreement (entered into on the occasion of an advance being made by the plaintiff to the defendant) to execute a mortgage "with an immediate power of sale."

LORD SELBORNE, L. C., said that he had no doubt of the propriety of making the decree asked for, unless the defendant was prepared to pay off the advance at once.²

¹ Compare: *Davis v. Davis*, 88 Ga. 191; *Van Meter v. McFadden*, 8 B. Mon. 435; *Gardner v. McClure*, 6 Minn. 250; *Gorhard v. Flynn*, 25 Miss. 58; *Bloom v. Noggle*, 4 Ohio St. 45; *Woodward's Ex'r v. Trumbull*, 50 Pa. 509; *Bicknell v. Bicknell*, 31 Vt. 498. — ED.

² Compare: *Sir Simeon Stewart's Case*, 2 Sch. & Lef. 381; *Re Humble*, 11 Ir.

TEBB v. HODGE.

COMMON PLEAS, 1869.

[*L. R. 5 C. P. 73.*]

KELLY, C. B. The plaintiff, in December, 1867, entered into an agreement with Barrows (whose assignee in bankruptcy the defendant Hodge is) to grant him a lease for twenty-one years of premises in Holborn of which Barrows was already in possession or of which he was to take immediate possession. One of the terms of the agreement was that Barrows should fit up the premises forthwith in a substantial and appropriate manner as a first-class luncheon-bar and restaurant, such fittings to be of the value of £500 at least, and to be completed to the satisfaction of the plaintiff on or before the 11th of February then next. Barrows being thus in possession, and the fixtures and fittings having been completed to the satisfaction of the plaintiff before April, 1868, the premises were in a condition to entitle Barrows to call for a lease, and to entitle the plaintiff to call upon him to accept a lease; and the plaintiff did in fact offer Barrows a lease. Another term of the agreement upon which the lease was to be granted was, that Barrows should pay £1,000 by way of premium. It seems that Barrows was not in a condition to pay that sum; and it was also made a term of the agreement that the plaintiff should advance or procure for him an advance of £1,000 for the period of two years, at 5 per cent interest, for which advance "the premises as fitted and licensed" were to constitute the security; and it was further agreed that, if the lessee should assign or underlet the premises before the expiration of the two years, the mortgage of £1,000, with interest, should be paid off and discharged. The plaintiff was ready to complete the contract on his part and to grant Barrows the stipulated lease; but Barrows declined to take the lease then, "as he could deposit the agreement as a security." The case states that Barrows afterwards "applied to the plaintiff for liberty to assign the agreement, by way of mortgage: but the plaintiff refused his consent till the lease had been taken up. The plaintiff consented to the agreement being deposited as a security, subject to his claim of £1,000." Thus, the plaintiff refused to abandon the grant of the lease for twenty-one years, and to allow the substitution of the agreement as a completion of the transaction. It seems to me to be quite clear that there was an agreement between the parties that,

Ch. 132; *Jones v. Brewer*, 1 N. B. Eq. 630; *Ashton v. Carrigan*, 13 Eq. 76; *Rogers v. Challis*, 27 Beav. 175; *Western Co. v. West*, 1892, 1 Ch. 271; *Robinson v. Carthcart*, 2 Cr. C. C. 590; *Richardson v. Harnlett*, 33 Ark. 237; *O'Neil v. Sexius*, 85 Ala. 80; *Daggett v. Rankin*, 31 Cal. 321; *Hall v. Hall*, 50 Conn. 104; *Clavana v. Landers*, 7 Gill, 354; *Hicks v. Turck*, 72 Mich. 311; *Irvine v. Armstrong*, 31 Minn. 216; *Adams v. Johnson*, 41 Miss. 258; *McQuie v. Pray*, 58 Mo. 56; *Dean v. Anderson*, 34 N. J. Eq. 496; *Re Howe*, 1 Paige, 125; *Boehl v. Wadgymar*, 54 Tex. 589; *Ott v. King*, 8 Gratt. 224; *Knox v. Mfg. Co.*, 30 W. Va. 790. — Ed.

until the lease was executed, the agreement of December, 1867, was to be a security to the plaintiff for all that he was entitled to under it. *Rebus sic stantibus*, the plaintiff could at any moment have enforced the execution of a mortgage for the £1,000, inasmuch as there was an equitable contract between him and Barrows that "the premises as fitted and licensed" should stand as a security for that sum. The result, as it seems to me is, that the plaintiff became equitable mortgagee of the premises with the fittings and fixtures, and the defendants had no right to seize and sell them under the adjudication of bankruptcy against Barrows, and consequently this action is maintainable. The judgment of the Court of Common Pleas must be affirmed.

MELLOR, J., and CHANNELL, FIGOTT, and CLEASBY, BB., concurred.
*Judgment affirmed.*¹

CITY INSURANCE CO. v. H. L. OLMSTED, ADMINISTRATRIX.

SUPREME COURT, CONNECTICUT, 1877.

[33 Conn. 476.]

BILL in equity, brought to the Superior Court for New Haven County, praying that certain insurance stock belonging to the estate of Lucius D. Olmsted, deceased, and which he had in his lifetime contracted to transfer to the petitioners as security for an indebtedness to them, might be sold and the proceeds applied on the debt, or that the respondent, his administratrix, might be ordered to transfer the stock to the petitioners, to be applied at its ascertained value to the debt.

HINMAN, C. J. We have no doubt of the general equity of the petitioners' case as against Lucius D. Olmsted, if he was still living or as against his heirs now that he is dead; but the main fact relied upon in the petition as the ground of equitable relief, as distinguished from the relief which all the creditors of his estate are entitled to, namely, the insolvency of his estate, and which is fully found by the court, must deprive the petitioners of the specific relief sought for in this bill. It cannot be claimed that the petitioner shave any lien upon this stock. The deceased was indebted to them, and for the better securing of that indebtedness he agreed to transfer to them, on or before the maturity of certain notes, the subject of that indebtedness in part, the stock in question. But this was never done, and he subsequently died deeply insolvent, and the petitioners now seek the specific execution of this contract on the part of his administratrix, who of course represents all the other creditors of the estate.

¹ Compare: Taylor v. Eckersley, 2 Ch. D. 302; Morrow v. Turney, 35 Ala. 131; Apperson v. Moore, 30 Ark. 56; Shocklen v. Davis, 17 Ga. 177; Gregg v. Sandford, 24 Ill. 17; Schaffenberg v. Bishop, 35 Ia. 60; Tiebers v. Burgess, 11 Md. 452; Sellers v. Lester, 48 Miss. 513; Roehholz v. Schwartz, 46 N. J. Eq. 477; Hall v. Omaha Bank, 49 N. Y. 626; Colles Appeal, 107 Pa. 590. — ED.

This is the whole case. As the legal title to the stock was in Olmsted up to the time of his death, any creditor of his might have attached it; *Dutton v. Connecticut Bank*, 13 Conn. 498; or if he had been forced into bankruptcy, or had assigned it for the benefit of his creditors, his assignee would have held it. *Swift v. Thompson*, 9 Conn. 63; *Shipman v. Ætna Insurance Company*, 29 id. 245. Indeed the last case is a direct authority in favor of the respondent on every point involved in this, unless some distinction favorable to the petitioners can be drawn from the circumstance that the assignee in that case represented the creditors of a living bankrupt, while in the case at bar the administratrix represents the creditors of an insolvent estate. But there is obviously no ground for any such distinction. Had this stock been attached before Olmsted's death the lien would have been dissolved for the benefit of all his creditors, though valid against the petitioners had he lived. On his death all the creditors stand upon the same footing, and equality is equity.

We advise the Superior Court to dismiss the petitioners' bill.

*In this opinion the other judges concurred.*¹

NEWSOM v. BEARD.

SUPREME COURT, TEXAS, 1876.

[45 Tex. 151.]

APPEAL from Colorado. Tried below before the Hon. Livingston Lindsay.

In 1872 T. R. Beard shipped to market a lot of hogs for one J. G. Burke. Burke became indebted on account to Beard, and promised him that he would send another drove of hogs to market by Beard, and that he should have a lien on all his (Burke's) hogs for the debt.

Thereafter, in June, Burke, then owning sixty or seventy head of hogs in Colorado County, sent one J. B. Walker to Eagle Lake, with written authority to mortgage the hogs to any one who would advance \$125 gold. The loan was obtained from Beard, who at that time resided at Eagle Lake. Soon after the loan Beard moved to Harrisburg, in Harris County. Six weeks after Beard's removal to Harrisburg he found, on the cars for Galveston, in charge of one Dunn, a drove of Burke's hogs. Beard procured an attachment for the hogs, but by agreement with Dunn the hogs were taken to Galveston and sold, and the money deposited with Lee, McBride & Co. until the ownership should be determined. Before the shipment, the hogs had been sold to

¹ Compare: *Hamilton v. National Loan Bk.*, 3 Dillon, 230; *Re Little Power Co.*, 92 Fed. 585; *Roundtree v. McLain*, Hempst. 245; *Loth v. McCarthy*, 85 Ky. 581; *Johnson v. Hooder*, 72 Ind. 395; *Moors v. Reading*, 167 Mass. 322; *New York Co. v. Saratoga Co.*, 159 N. Y. 137; *Phelps v. Murray*, 2 Tenn. Ch. 246. — Ed.

Newsom & Co., Burke telling them that Beard once had a lien on them, but that it had been discharged.

Suit was brought by Beard on his account for \$285 gold against Burke, and against Newsom & Co., vendees of the hogs.

Verdict was rendered for plaintiff, and judgment was rendered for the whole amount against all the defendants.

Other facts are given in the opinion.

Newsom & Co. appealed.

IRELAND, ASSOCIATE JUSTICE. The exceptions to the petition were overruled, as appears from a bill of exceptions contained in the record. The court erred in overruling the exceptions to plaintiff's petition.

Nor do we think there is sufficient proof contained in the record to show that Burke had given plaintiff a mortgage on any hogs. It is true that in a certain class of cases equity will raise a lien; as for instance, where a man is put into possession of real estate, with an agreement that he is to make certain improvements or perform certain labor in or about said property, for which the owner was to give him a mortgage to secure him for said labor. In such a case equity would say that the tenant had a lien, whether the mortgage was executed or not. But we do not think that this principle can be extended to chattels, the number, kind, and value of which were not shown at the time, and which were in a different county, and were never in the possession of the creditor. A mere letter authorizing the bearer to execute a mortgage on certain hogs under the circumstances named could not be construed as a mortgage. (Mood's Appeal, 6 W. & S. 284.) The verdict of the jury was not warranted by the testimony or the charge of the court. The judgment is reversed and the cause remanded.

*Reversed and remanded.*¹

IN RE SHERIDAN ET AL.

DISTRICT COURT OF THE UNITED STATES, 1899.

[98 Fed. Rep. 406.]

IN BANKRUPTCY. The referee in bankruptcy found that a pledge of personal property by the bankrupt to one of his creditors was an unlawful preference under the Bankruptcy Act, and made an order requiring the creditor, who had sold the goods pledged, to pay over the proceeds to the trustee in bankruptcy. The case is now before the court on the creditor's exceptions to such decision of the referee.

McPHERSON, D. J. The exceptant relies on *Ex parte Potts*, Fed. Cas. No. 11,344, but an examination of that case will show that the

¹ Compare: *Collins v. Plummer*, 1 P. Wms. 104; *Williams v. Lucas*, 2 Cox, 160; *Berrington v. Evans*, 3 Y. & C. 384; *Addison v. Enoch*, 62 N. Y. S. 613; *Phillips v. Hogue*, 88 N. W. (Neb.) 180.—Ed.

decision was upon a different state of facts. One question there was whether a pledge actually made was fraudulent; and it appeared that the alleged bankrupts, when they were admittedly solvent, had assigned to a creditor, as collateral security for advances, several policies of insurance and bills of lading upon a vessel and cargo then at sea. Under such circumstances, it was correctly held that the transfer was not in fraud of creditors. The assignment of the policies was a completed transfer of the debtor's interest in those instruments, and the assignment of the bills of lading transferred the title to the property therein described, without any further act. As to almost all the property then under consideration, therefore, the transaction had been fully executed. One policy or one bill of lading was apparently not transferred until May, when the alleged bankrupts had become "involved" (there was no averment of insolvency in the petition); but as the last advance by the creditor had been made in March, in pursuance of an agreement made in February, the court was clearly right in holding that no part of the transaction was fraudulent. No question of preference arose, whereas here the question is one of preference simply. The goods here were never actually pledged until the exceptant, for the first time, took them into his possession a few days before the petition was filed. Before that time there was a mere agreement to pledge. The goods were never delivered to the exceptant, nor (assuming, for present purposes, that this would have been good against the other creditors) were they even set apart and continuously treated as his property. Under the facts proved, the pledge was not completed until the date of removal. *Lucketts v. Townsend*, 49 Am. Dec. 730, note. This being so, the exceptant's title attached upon that date, and the transfer created a preference in violation of the act.

The exceptions to the finding of the referee are overruled, and his order directing the exceptant to pay to the trustee the money received from the sale of the goods in question is approved.¹

DAVIS v. CLAY.

SUPREME COURT, MISSOURI, 1829.

[2 Mo. 130.]

WASH, J., delivered the opinion of the court.

In this cause a bill was filed by the complainant against the defendant and one Scott, to foreclose a mortgage, &c. The Circuit

¹ Compare: *Martin v. Reid*, 11 C. B. N. s. 730; *Casey v. Cavaroc*, 96 U. S. 467; *Sabine v. Pond*, 98 Fed. 976; *Re Clingman*, 101 Fed. 691; *Hitcock v. Hassett*, 71 Cal. 331; *Huntington v. Sherman*, 60 Conn. 463; *Kerser v. Topping*, 72 Ill. 226; *Copeland v. Barnes*, 147 Mass. 388; *Rockwell v. Claggett*, 69 N. H. 201. — WILLISTON: CASES ON BANKRUPTCY, 388 n.

Court decreed the foreclosure, sale, &c., from which Davis appealed to this court.

The facts are, that on the 23d of June, 1821, the above named defendant, Scott, executed a covenant, real mortgage, or instrument in writing, to the testator, Morrison, in the words following, to wit: "To all to whom these presents shall come: Whereas, I, John Scott, of the county of Ste. Genevieve and State of Missouri, am justly indebted to Col. James Morrison, of the county of Fayette, in the State of Kentucky, in the sum of three thousand eight hundred and thirty-eight dollars and sixty-six cents, lawful money of the United States, to bear interest from the date hereof; for which sum, said Scott has executed his note of equal date with these presents, till full and perfect payment. Now know ye, for the better securing unto the said Morrison, his heirs and assigns, the full and perfect payment of the said sum, on or before the first day of March next ensuing; that I, the said John Scott, for (162) myself, my heirs, executors and administrators, do covenant, promise and agree to and with the said James Morrison, his heirs, executors, administrators and assigns, that the undivided interest of one third part of, in and to, a certain tract of land, known by the name of the Saline tract, in the county of Ste. Genevieve and State of Missouri, owned in common with Henry Dodge and the heirs of Edward Hempstead, containing about twelve thousand arpents more or less, being the same that was purchased by said Dodge, Hempstead and Scott, as the property of Mr. Peyroux; and also, as the property of Mr. Maxwell, as by deeds of record will fully appear, and every part and parcel thereof shall stand charged and chargeable with, and stand, continue, and be a security unto him the said Morrison, his heirs, executors, administrators and assigns, as well for the payment of the principal as the interest thereon, until the same shall be fully and finally paid and satisfied according to the true intent and meaning of these presents; reserving, however, to the said John Scott, his heirs and assigns, the rents and profits of the said land and saline, above and before securited and mortgaged," &c.; which was regularly acknowledged and recorded on the day of its date, and of which the defendant Davis had full notice; that after the execution of said instrument in writing, a judgment was obtained against said Scott, under which the premises were seized and sold to the defendant Davis, for the consideration of one dollar.

The questions presented for consideration are,

First. Whether the instrument be valid as a legal mortgage, &c.?

Second. If not a mortgage in law, whether it can be an equitable lien?

The instrument is imperfect and defective as a legal mortgage, but it may well be regarded as an equitable mortgage.

An agreement respecting real estate, for good consideration, imposes a lien as against persons having notice, &c. 4 Brown Ch.

s. 31-4, Brow. Ch. 462, P. Wms. 282 and 429. If an equivalent be given, though the contract be not executed with all the formalities of law, yet in equity, the use is in the purchaser, &c., Gilb. Uses, 49 Eq. 30.

*The decree of the Circuit Court is, therefore, correct, and must be affirmed with costs.*¹

DONALD & CO. v. HEWITT.

SUPREME COURT, ALABAMA, 1859.

[33 Ala. 534.*]

WALKER, J. The complainants in the original bill, Schnetz & Hewitt, and Thomas Moore, one of the respondents, at Louisville in the State of Kentucky, made a written contract under seal, whereby the former agreed to make an engine, and put in on board of a certain boat; and the latter agreed to pay therefor \$3,400 during the progress of the work, and, besides, to give three "notes or acceptances" for equal amounts, making together the sum of \$3,400. The writing concludes with a stipulation, that for the better security of the payment "of the said notes," Schnetz & Hewitt were to retain a special lien on said boat and engine until "the notes" were paid. Moore paid \$3,400 during the progress of the work, and accepted six bills of exchange, for amounts together exceeding \$3,400. The boat, having been brought to Montgomery in this State, was attached and libelled by creditors of Moore & Jackman, the owners of the boat. The bill asserts for the complainants a prior lien upon the boat, and is designed to enforce that lien.

The parties unquestionably had a right by contract to create a charge upon the boat, which would exist independent of the possession of the thing charged. The inquiry, unembarrassed by the technical meaning imputed to the word *lien*, is whether they have done so. Such a lien has every characteristic of an equitable mortgage, and may properly be so denominated. Every agreement for a lien or charge *in rem* constitutes a trust, and is accordingly governed by the general doctrine of trusts. Such a lien or charge is called an equitable mortgage, because courts of chancery, regarding them as trusts to be enforced, attach to them the incidents of a mortgage. Thus, an agreement that bills should be paid out of the proceeds of certain property has been held to create an equitable mortgage. Miller on Equitable Mortgages, 3. An agree-

¹ Compare: *Burgh v. Francis*, Finch, 28; *Hildreth v. Hues*, 33 Beav. 52; *Margum v. Orange Co.*, 37 Fla. 165; *Tiernan v. Poor*, 1 Gill & J. (Md.) 216; *Abbott v. Godfrey*, 1 Mich. 178; *Bullock v. Whipp*, 15 R. I. 195; *Bryce v. Massey*, 35 S. C. 127; *Morrill v. Morrill*, 53 Vt. 74. — ED.

² This case is abridged. — ED.

ment, "pledging and hypothecating" property for the payment of certain bills, was enforced as an equitable mortgage. *Fletcher v. Morey*, 2 Story, 555. A contract that a party "should have and maintain a lien" on chattels was characterized as "in the nature of an equitable mortgage," and as such enforced. *Dunning v. Stearns*, 9 Barb. Sup. Ct. Rep. 630. And an unsealed instrument of writing, pledging the real and personal estate of a railroad company for the faithful performance of a contract, was held by this court to be an equitable mortgage. *M. & C. P. R. R. Co. v. Talman*, 15 Ala. 473; see, also, *Whitworth v. Gaugain*, 3 Hare, 415; *Campbell v. Worthington*, 6 Vt. 448; *Bank of Kentucky v. Vance*, 4 Littell, 168; *Marshall v. Lewis*, 4 Littell, 140; *In re Howe*, 1 Paige, 125; *Abbot v. Godfrey*, 1 Man. (Mich.) 178; *Coster v. Bank of Georgia*, 24 Ala. 37; *Kelly v. Payne*, 18 Ala. 371.

The authorities cited upon the brief of the counsel for appellees show that the equitable mortgage, created by the contract of Moore with Schnetz & Hewitt, overrides the liens of the attaching and libelling creditors. See those cases; also, *Willard's Eq. Jur.* 443; 2 Story's *Eq. Jur.* 655, §1228; *Jenkins v. Bodley*, 1 S. & M.'s Ch. R. 338; *Dunlap v. Burnett*, 5 S. & M. 702.

Our argument thus far shows, as we think, that Schnetz & Hewitt have a lien, by virtue of their contract of July, 1849, which they are entitled to enforce in this suit. But the sum for which a lien is given by that contract is limited to \$3,400. The debt of the complainants is much larger, and is shown by the proof to have become so in consequence of work done in addition to that prescribed by the contract. The lien given by the contract cannot be enlarged, so as to secure this addition to the indebtedness, upon the ground that it was verbally agreed, or intended, or understood, when the additional work was done, that it should be so enlarged; or upon the ground that the additional indebtedness was contracted on the faith of the lien; for there is no averment in the original or amended bills of such facts. In the entire omission of any such averments, this case differs from *Fletcher v. Morey*, 2 Story, 555.

The decree of the court below is reversed, and the cause remanded, that a decree may be rendered consistent with the foregoing opinion. The appellant must pay the costs of this court.¹

¹ Compare: *Craddock v. Institution*, 69 L. T. 380; *Jarvis v. Woodruff*, 22 Conn. 548; *Peckham v. Haddock*, 36 Ill. 38; *Brown v. Brown*, 103 Ind. 23; *Day v. Griffith*, 15 Ia. 104; *Gilson v. Gilson*, 2 Allen, 115; *Braddley v. Merrill*, 88 Me. 319; *Dechaire v. Keenan*, 3 Desaus. 74; *Jarvis v. Dutcher*, 16 Wis. 307. — Ed.

RICCARD v. PRICHARD.

CHANCERY, 1855.

[1 *Jurist N. S.* 750.]

IN January, 1852, the defendant Prichard was in prison on a *ca. sa.*, at the suit of the plaintiff Riccard, for £531. Prichard was at that time prosecuting a demand for a considerable sum against a railway company to which he had been engineer, and which was being wound up. It being represented to the plaintiff that the imprisonment of Prichard was likely to prejudice his claim, it was arranged that the defendant should be released. The taking in execution having been a satisfaction of the debt, the defendant confessed a new judgment on his release for £548 debt and fresh costs, and Mr. Phillips, his solicitor, wrote a letter, dated the 12th January, 1852: "Prichard v. Riccard. Second action. In pursuance of the arrangement for liberating the defendant from prison, we undertake to pay the whole amount due at the time of such payment upon the judgment in the first action, or so much thereof as the moneys in our hands shall be able to satisfy, out of any moneys which may be received by us from the claims pending on behalf of Mr. Prichard, and which may remain in our hands after payment or satisfaction of any costs or lien which may be due to us, or which we may have thereon." The defendant afterwards approved this letter, and authorized Phillips to carry out the arrangement. The defendant got a sum of £3,538 awarded to him against the company on arbitration, on which he sued out judgment and execution, but got a return of *nulla bona*. He then attached a larger debt due to the railway company from certain canal companies, who thereupon paid the amount of the attachment into the Common Pleas. The defendant was now seeking to get this money into his own hands, having changed his solicitors. The original solicitor, Phillips, was the plaintiff in one suit. The facts were not denied. The plaintiffs in both suits had obtained *ex parte* injunctions, and the defendant now in each case moved to dissolve them.

SIR W. P. WOOD, V. C. The injunction must be continued. The agreement stated in the bill (and admitted by the defendant) contains just the clause which brings it within the rule laid down in *Rodick v. Gandell* (*ubi sup.*), viz., "that where there is an agreement between debtor and creditor that the debt owing shall be paid out of a particular fund coming to the debtor, that creates a valid equitable charge upon the fund, and operates as an equitable assignment of the fund *pro tanto*." The defendant does not deny the allegation in the bill as to the arrangement on his release from prison; he does not deny that Phillips was his solicitor; all that he ventures to say is, that he cannot say whether all the representations and promises

which Phillips then made were with his, the defendant's, full knowledge and consent or not. The quibble by which the defendant says he undertook to pay the plaintiff out of these moneys when he should receive them, but that he never intended to receive them, but to apply them some other way, reminds one of the quibble unsuccessfully raised at common law on a promissory note, in which the maker of the note said, "I promise not to pay." I therefore refuse this application, with costs.¹

IN RE BELL.

CHANCERY, 1895.

[1896, 1 Ch. 1.]

A. L. SMITH, L. J. William Bell died leaving a will under which Dudley Wells became beneficially entitled to one-eighth share of a legacy of £8,000 bequeathed to trustees. He assigned that share to Garland by way of security with a proviso for redemption, and that mortgage has been transferred to Mr. Jeffery. A subsequent encumbrance was created by Dudley Wells on this share, and he afterwards became bankrupt, and by a deed of arrangement under the Bankruptcy Act assigned the share to a trustee for the benefit of his creditors, subject to Jeffery's mortgage. Mr. Jeffery is entitled under his security to £380 and interest, and has taken out an originating summons asking that the trustees of the will may be ordered to pay over to him the whole of Dudley Wells's share, amounting to £1,000. The puisne encumbrancers were not before the court, but Mr. Jeffery, on his own showing, is not entitled to the £1,000, but only to a sum which I will call £400, and the question is whether he is entitled to demand to have the whole £1,000 paid over to him. It would be absurd for me to say that I am as familiar as my brother Rigby with the practice of the Court of Chancery; but it certainly seems to me odd that because a man is entitled to receive out of a trust fund £400 he is therefore entitled to receive and administer the whole fund. Is this so? Mr. Marten admitted that if the fund was in court, the court would only pay out to Mr. Jeffery the £400, and would itself administer the remainder. It is clear that Mr. Jeffery has only a security for £400 on the £1,000, and why should the whole £1,000 be paid to him? No reason was given why it

¹ Compare: *Ex parte Atkins*, 2 Y. & C. 536; *Row v. Dawson*, 1 Ves. 331; *Bennett v. Cooke*, 9 Beav. 252; *Ex parte Flower*, *Cave v. Cave*, 15 Ch. D. 639, 4 D. & C. 449; *Brice v. Bannister*, 3 Q. B. D. 569; *Judson v. Cocoran*, 17 How. 612; *Elmes v. Sutherland*, 7 Ala. 262; *Crumbaugh v. Smock*, 1 Blackf. 305; *Miller v. Michaud*, 11 Rob. 225; *Hamlin v. R. R.*, 22 Me. 83; *Kligh v. Michenor*, 11 N. J. Eq. 539; *Leyden v. Malloy*, 10 Ohio, 442; *Watkins v. Wyatt*, 68 Tenn. 250. — ED.

² Only one opinion is printed. — ED.

should be. Kekewich, J., has gone further than ordering this payment; he has held that the trustees were so wrong in refusing to make the payment that they ought to be ordered to pay the costs of the proceeding to compel them to make it. The order must be reversed, and Mr. Jeffery must be ordered to pay the trustees' costs relating to this part of the case.¹

SPOONER v. SANDILANDS.

CHANCERY, 1842.

[1 Y. & C. C. C. 390.]

THE bill charged that the power of attorney was not revoked by the death of Richard Sandilands, and that the same was part of a security for a debt justly due to the plaintiffs. The bill further charged, that even if it were as a power of attorney revoked by the death of Richard Sandilands, yet that it operated not only as a power of attorney, but also as a contract and agreement in writing by Richard Sandilands with the plaintiffs and their late partners, that possession of the said freehold lands and premises should be retained by the plaintiffs and their late partners, and the rents and profits thereof be received by them, until they should be duly paid and satisfied the said sum of £241 7s. 9d., the aforesaid arrears of interest, and also all interest which should from time to time become due and owing for or in respect of the said sum of £1,789 18s. 4d., or any part thereof, so long as the said sum of £1,789 18s. 4d., or any part thereof, should remain due. The bill further charged that the power of attorney was a valid equitable charge upon the said freehold lands and hereditaments, and constituted a good lien thereon, and entitled the plaintiffs to retain possession thereof.

THE VICE CHANCELLOR. I am of opinion that the instrument in question amounts to a contract to charge the freehold hereditaments in question; under which the plaintiffs became entitled to enter into possession, and retain the possession, and receive the rents, until thereby or otherwise they should be paid the £1,789 18s. 4d., and interest, and the interest then remaining due in respect of the £2,500. It is impossible to doubt that this was the intention of the parties, and I think that this intention has been carried into effect, and that, therefore, there must be the usual account as in a foreclosure suit, where the mortgagee is in possession, of the principal money and interest due to the mortgagee, and of the amount due to him for

¹ Compare: *Burlington v. Hall*, 12 Q. B. D. 347; *Re Foligno's Mortgage*, 32 Beav. 131; *Commercial Bank v. Bemis*, 177 Mass. 95; *Kamena v. Hullbig*, 23 N. J. Eq. 78; *Mooney v. Byrne*, 163 N. Y. 86; *Pratt's Appeal*, 77 Pa. 378; *Strange v. Houston Co.*, 53 Tex. 172. — ED.

costs, both here and at law; not directing, at present at least, either a sale or foreclosure. I will not grant any injunction, the defendant undertaking not to proceed at law. Further directions and costs must be reserved until after the Master shall have made his report.¹

EX PARTE JULIA ROGERS, IN THE MATTER OF THOMAS
SELBY AND SILAS NORTON, BANKRUPTS.

CHANCERY, 1856.

[8 *De G. M. & G.* 72.]

THE LORD JUSTICE TURNER. The security is, by the letter of the 7th of October, 1844, described as being on a mortgage for £600 from Messrs. Marchant of their shares in several estates in the county of Kent and elsewhere in the kingdom of England. Now, there had been a mortgage to which Messrs. Selby & Norton were entitled on estates which had been sold, and a portion of the purchase-money was invested for the purposes of indemnifying the purchaser. There was no mortgage to satisfy the description in the letter except Messrs. Selby & Norton's charge on this indemnity fund, and the question is, whether the letter gave a security on this charge. What were the equities between the parties at the time of the bankruptcy? Had or had not Miss Rogers a right to have the representations held out to her by Messrs. Norton made effectual so far as they had the means of so doing? They had represented to her that the sum was secured on mortgage, and it cannot, I think, be doubted that if a bill had been filed by her stating that this representation was not correct because the charge had been converted into one upon a sum of stock she would have been held to have a right in equity to have her security perfected as against the persons who made that representation.

THE LORD JUSTICE KNIGHT BRUCE concurred.²

¹ Compare: *Dale v. Smithwick*, 2 Torr. 151; *Watson v. King*, 4 Camp. 272; *Wallace v. Cook*, 5 Esp. 117; *Simons v. Balles*, 2 Jones & L. 489; *Mix v. White*, 36 Ill. 484; *Reed v. Welsh*, 11 Bush, 450; *N. Y. Co. v. Saratoga Co.*, 159 N. Y. 63; *Pemberton v. Simmons*, 100 N. C. 316. — ED.

² Compare: *In re Crowdy*, 46 L. T. 41; *Saunders v. Dunman*, 7 Ch. D. 825; *Carew v. Arundel*, 8 Jurist N. S. 71; *Ex parte Mason*, 35 Beav. 443; *Bretts v. Broughton*, 72 Ala. 294; *Daggett v. Rankin*, 31 Cal. 321; *Whiting v. Eichelberger*, 16 Ia. 422; *Williams v. Stratton*, 18 Miss. 418; *Matter of Howe*, 1 Paige, 124; *Webb v. Patterson*, 27 Heisk. 431; *Atkinson v. Miller*, 34 W. Va. 115. — ED.

WHITWORTH v. GAUGAIN.

CHANCERY, 1844.

[3 Hare, 416.]

VICE CHANCELLOR. The plaintiffs, in this case, are equitable mortgagees of one George Cooke, by a deposit of title-deeds of freehold estates, accompanied with a memorandum in writing, explaining that the purpose of the deposit was to secure a then existing debt and future advances. That memorandum is in the following words. [His Honor stated the memorandum.]

To explain the legal effect of this transaction as between the plaintiffs the mortgagees, and Cooke the mortgagor, I shall content myself with quoting the words of the Lord Chancellor of Ireland, in the case of *Rolleston v. Morton*: "If a man has power to charge certain lands, and agrees to charge them, in equity he has actually charged them; and a court of equity will execute the charge." No one, I apprehend, could seriously contend that the memorandum in writing above set forth had not the effect of charging the property as between the mortgagees and the mortgagor. It created as perfect an equitable charge as intention and act can possibly create.

The defendants, between whom and the plaintiffs the contest in the cause exists, are judgment creditors of George Cooke, whose judgments were entered up after the mortgage to the plaintiffs, and who have since, by means of elegits, obtained actual possession of the lands comprised in the mortgage; and the question between them is, which of the two is in equity to be preferred to the other? In considering that question I shall here repeat what I have on more than one occasion already said respecting Lord COTTENHAM's judgment when this cause was before him upon motion, namely, that I am satisfied he did not intend, by what he said, finally to decide the point now before me. However strong the leaning of his mind may have been in favor of the judgment creditor, he not only did not intend to decide it, but intended that it should be reserved. And I, therefore, consider myself not only at liberty, but bound to decide the cause according to my own understanding of the law.

Now, if the question be not decided by that judgment, I have certainly a very strong opinion upon it. The more I consider the case, the more satisfied I feel that I stated the general principle correctly in *Langton v. Horton* when I said that a creditor might, under his judgment, take in execution all that belonged to his debtor, and nothing more. He stands in the place of his debtor. He only takes the property of his debtor, subject to every liability under which the debtor himself held it. First, take the case of an ordinary trust. It could not for a moment be contended that this court would not protect the interest of the *cestui que trust* against the judgment creditor of the

Jus.

trustee. The judgment of LORD COTTENHAM in *Newlands v. Paynter* is decisive upon that point, and the other cases cited at the bar prove the same thing. Secondly, take the case of a purchaser for value before conveyance. *Lodge v. Lyseley* is an authority, if authority could be wanting, to show that the equitable interest of such a party will be preferred in equity to the claim of the judgment creditor of the vendor. Again, take the case of an equitable charge to pay debts, or legacies, or any other equitable interest, except that of an equitable mortgagee; and I apprehend the right of the equitable encumbrancer to be preferred to the judgment creditor of the debtor, in whom the legal estate in the property charged might be, will be, as indeed it properly was, admitted. And if such equitable interests are thus protected, upon what principle is the equitable mortgagee to be excluded from the like protection? Unless I misunderstand the report of the case of *Williams v. Craddock*, the counsel, as well as the court, were of opinion, that an interest by way of equitable mortgage was entitled in this court to the same protection against judgments as other equitable claimants.

In the argument of this case both parties referred to, and drew conclusions from, the proposition, that in a court of equity a purchaser for value, who obtains a conveyance of the legal interest without notice of an equity affecting the specific subject of his purchase, will, in equity, as at law, have a better title to that subject than the mere equitable claimant. The proposition thus admitted, and necessarily admitted, by both parties, is pregnant with consequences which go a great way towards deciding the question now before me. If the tenant by elegit is (as was argued) to be considered as a purchaser for value without notice under a conveyance, all trusts, and all equitable interests of every description, must be subject to the judgments against the trustee. For a purchaser for value, without notice from a fraudulent trustee, having got the legal estate, will unquestionably be preferred in equity to the *cestui que trust*; and it appears to me to be impossible, except by a merely arbitrary decision, to distinguish the case of an ordinary trust or other equitable interest from the present, in considering merely the effect of a judgment upon it, unless it can be shown that the interest of the equitable mortgagee is, for the present purpose, distinguishable from that of an ordinary *cestui que trust*. Again, it follows, conversely, that, if the equitable interest of an ordinary *cestui que trust*, or any other equitable interest, is not subject to judgments against the trustee, though executed, then those judgments, though executed, are not analogous to purchases for value. In other words, the judgment creditor of a trustee is not a purchaser for value in the contemplation of a court of equity. The proposition, that a judgment creditor is a purchaser for value, would prove too much for the defendants' purpose. It would affect all equitable interests.

no distinction says C. — But it was said that the interest of an equitable mortgagee was distinguishable from that of an ordinary *cestui que trust*, and other equitable interest (charges, for example, to pay debts and legacies paramount

the title of the debtor), which it was admitted would be preferred in equity, — that the interest of the equitable mortgagee was imperfect, — that of the *cestui que trust* perfect. In what respect is the interest of the equitable mortgagee imperfect. As between the mortgagor and mortgagee it is absolute and complete. In what respect is it imperfect as between the mortgagee and those who claim under the mortgagee, as his creditors by judgment? The interest of the equitable mortgagee is liable to be defeated by a fraudulent dealing with the legal estate, and in that respect, no doubt, it is imperfect. But that is an infirmity to which all equitable interests are subject; and if other equitable interests are to be protected against judgments obtained against the trustee, or other party in whom the legal estate may be, why is the interest of the equitable mortgagee to be unprotected? The debt was no more contracted upon the view of the land (if that were material, which I think it is not) in the one case than in the other.

I can only repeat, that it appears to me impossible, except upon the most arbitrary distinction, to say that the interests of an equitable mortgagee are not to be protected, and yet that protection is to be afforded to the interests of an ordinary *cestui que trust* and other equitable interests. I do not go into the reasoning of the cases which have been cited; all of them, however, appear to me to support the view I have taken. If my judgment cannot be supported upon propositions which are indisputable in themselves, — whether properly applicable to the case, or not, — no explanation I can give of the cases will at all strengthen the foundation of that judgment. I must hold that the plaintiffs have a right to the payment of their debt out of the estate, comprised in the deed. If there is any difficulty in the details of the decree, the case may be mentioned again.¹

TYLEE v. WEBB.

CHANCERY, 1843.

[6 Beav. 552.]

THE MASTER OF THE ROLLS. This is a bill filed by equitable mortgagees for a foreclosure of the mortgaged estate, against another equitable mortgagee, a purchaser who obtained the legal estate, and a legal mortgage under the purchaser.

¹ Compare: *Brace v. Marlborough*, 2 P. Wms. 491; *Casberd v. A. G.*, 6 Price, 411; *Brearccliffe v. Dorrington*, 4 De G. & Sm. 122; *Beavan v. Oxford*, 6 D. M. & G. 507; *Kindersley v. Jervis*, 22 Beav. 1; *Scott v. Hastings*, 4 K. & J. 633; *Eyre v. McDowell*, 9 H. L. 619; *Pickering v. Ilfracombe R. R.*, L. R. 3 C. P. 235; *Abbott v. Stratten*, 3 Jones & L. 603; *Dunster v. Glengall*, 3 Ir. Ch. 47; *Pennock v. Coe*, 23 How. 117; *Re Howe*, 1 Paige, 125; *Robinson v. Williams*, 22 N. Y. 380; *Insurance Co. v. Phoenix Co.*, 71 Pa. 31; *Delaire v. Keenan*, 3 Des. 74. — AMES: CASES ON TRUSTS, p. 412 n.

In the month of December, 1829, Robert Webb, being about to purchase a copyhold estate, borrowed the sum of £150, and as a security for the repayment, gave to the plaintiffs a promissory note, and signed an agreement for the deposit, of what were called the deeds of the premises, as soon as the same should be made out and in his lawful possession.

Robert Webb, having been admitted tenant of the premises, received a copy of the Court Rolls of the manor of which the premises were held. The copy was dated the 18th of December, 1829, and on the 12th of July, 1832, he placed it in the hands of the plaintiffs, with a declaration in writing signed by him, and which was in these words :

“BRISTOL, July 12th, 1832.

“I do hereby declare, that the deeds annexed hereto, left in the possession of Messrs. J. and T. Tylee, are as a security for an amount of £150, which I am indebted to said firm for cash advanced, and for which, interest at 5 per cent per annum I agree to pay ; and they are duly authorized to hold the same until the said amount of £150 and interest shall be fully paid.

ROBERT WEBB.”

Under these circumstances, the plaintiffs became equitable mortgagees of the copyhold estate in question.

Robert Webb died intestate on the 13th of October, 1832, leaving the defendant, Thomas Webb, his customary heir, and, as such, entitled to the estate, subject to the plaintiffs' equitable mortgage ; and on the 7th of November, 1833, Thomas Webb, as the heir of Robert, procured himself to be admitted tenant of the estate, and a new copy of Court Roll was granted to him. He paid the interest of £150 to the plaintiffs up to October, 1834 ; and if it be true, as has been said, that he thought he was paying interest on £150 secured by a promissory note, and was not, at first, aware of the equitable mortgage, the fact becomes immaterial, because it is proved that on the 10th of April, 1837, he had distinct notice of the mortgage. He had the legal estate, the copy of the roll showing his own admittance, and notice that the copy of the roll showing the admittance of his father, as whose heir he claimed, was in the hands of the plaintiffs as equitable mortgagees.

Thomas Webb made an attempt to sell the estate by auction in the month of July, 1837. The defendant, Mr. Hinton, was the solicitor employed to effect the sale, and his clerk Battiscombe took an active part in the business ; a sale was not effected, and consequently Thomas Webb was desirous to raise an additional sum by way of loan, and Mr. Hinton was induced to lend him £50 on a deposit of a copy of Court Roll of his own admittance.

A question is raised, whether at the time of this advance, Mr. Hinton had, or ought to be deemed to have had, notice of the plaintiffs' equitable mortgage.

It appears by a letter which was written by Battiscombe to Kelly

(an agent of the plaintiffs) on the 30th of November, 1835, that Battiscombe then knew, from the information of Webb, that the plaintiffs had a security on the premises; and further, by a letter which was written by Battiscombe to Webb on the 19th of July, 1837, that Battiscombe then knew that the proceeds of the then intended sale were to be applied in discharge of the plaintiffs' demand, and on the occasion of Hinton's loan, Battiscombe acted not only as his agent and clerk, but also as the agent of Webb, of whom he seems to have been a particular friend; and for the security of Hinton, Battiscombe sent to Webb for his signature, a memorandum of agreement, dated the 20th of July, 1837, and which Webb afterwards signed, whereby it was stated, that Webb had deposited with Hinton, a copy of Court Roll, dated the 7th of November, 1833, stating that, at a court held on that day, he, as the only son and heir of Robert Webb, who held, by virtue of a copy of Court Roll, dated the 18th of December, 1829, the estate in question, to which Thomas Webb claimed to be entitled as only son and heir of Robert, and that he was admitted tenant of the estate, and had deposited the copy of Court Roll as security for the £50 advanced by Hinton, and interest.

It does not appear to me that the knowledge which Battiscombe possessed in November, 1835, can be imputed to Hinton in 1837, or that Battiscombe's knowledge, in July, 1837, that the proceeds of the sale were intended to be applied in discharge of the plaintiffs' demand, clearly shows, that even he, at that time, recollected or knew that which he had known in November, 1835; and though I incline to think that Hinton, who knew that Thomas Webb had been admitted only in his character of heir of Robert Webb, and that Robert Webb had been admitted under copy of Court Roll, dated the 18th of December, 1829, must be deemed to have known that Robert Webb, having that copy of Court Roll, might have deposited it so as to create an equitable charge upon the estate, and, consequently, ought to have required its production before he advanced his money, yet it does not appear to me to be necessary to determine whether Hinton had, or ought to be deemed to have had, at that time, notice of the plaintiffs' right, for I think that under the circumstances, and by mere deposit of the son's copy of Court Roll, he could take only that which Webb the son could give, which was the interest he was entitled to as his father's heir, subject to the charge which his father had made: and however this may be, it is proved that in the early part of February, 1838, Mr. Hinton had direct and distinct notice of the plaintiffs' claim; and upon the evidence which is given, I am of opinion that the other defendants, Wilson and Lloyd, must, throughout the transactions in which they are concerned, be deemed to have had all the notice of the plaintiffs' claim which Hinton had.

The estate having been sold to Wilson, whose mortgagee Lloyd is, and the purchase-money being now in the hands of Hinton, the plaintiffs have, at the bar, claimed to have the purchase-money applied, as

far as it will extend, in satisfaction of their claims, and a right to proceed to foreclose the estate, if the residue of what may be due to them shall not be paid by the defendants personally. No such claim is made by the bill, nor could it have been sustained. The plaintiffs cannot have security upon both the estate itself, and the purchase-money which represents its value.

On the other hand, it has been objected, that the plaintiffs have unnecessarily made some of the defendants parties to the cause; but considering this as a bill foreclosure, I think that every one of the defendants was a necessary party, because each of them had a right to redeem.

On the whole, I am of the opinion, that the plaintiffs are entitled to have the ordinary decree for foreclosure of the equitable mortgage to which they are entitled.

I shall make the decree, unless the parties agree to confirm the sale, and to go against the purchase-money.¹

DAVEY & CO. v. WILLIAMSON, LTD. RICHARDS,
CLAIMANT.

QUEEN'S BENCH DIVISION, 1898.

[1898. 2 Q. B. 194.]

THE following statement of facts is taken from the judgment of LORD RUSSELL of Killowen, C. J. :

"The defendant company (a trading company) in January, 1894, being duly authorized to do so, issued £3,000 first mortgage debentures in sixty debentures of £50 each, and six of these were held by Richards, the claimant. They were made a charge on all the property of the company, real and personal, present and future, not assured or charged by the trust deed hereinafter mentioned, and were payable on December 31, 1898, or on such earlier date as the principal moneys thereby secured should become payable in accordance with the conditions indorsed thereon."

May 14. The judgment of the court (LORD RUSSELL of Killowen, C. J., and MATHEW, J.) was read by

LORD RUSSELL OF KILLOWEN, C. J. This is an appeal from the decision of His Honor Judge Paterson on an interpleader issue in which the question was whether the rights of the claimant, claiming for himself and the other holders of debentures of the defendant company

¹ Compare: *Stevens v. Stevens*, 2 Coll. 20; *Allen v. Knight*, 5 Hare, 272; *Roberts v. Croft*, 2 De G. & J. 1; *Hunt v. Elwes*, 2 D. F. & J. 578; *Bickerton v. Walker*, 31 Ch. D. 151; *Farrand v. Yorkshire Co.*, 40 Ch. D. 182; *In re Cactel*, 1898, 1 Ch. B. 15; *Stover v. Brown*, 18 Ind. 464; *Wendell v. Lambeth*, 163 Mo. 428; *Kelly v. Jenness*, 50 Me. 455; *Beson v. Eveland*, 26 N. J. Eq. 468; *Wilson v. Hicks*, 40 Ohio St. 418; *Owen v. Belnap*, 2 Johns. 573; *Reach v. Husbacher*, 55 Pa. 85; *Gregory v. Peoples*, 80 Va. 355. — ED.

(the judgment debtors), to certain goods seized under a writ of *fi. fa.* by the sheriff prevailed over the rights of the plaintiffs, who were the execution creditors.

The learned county court judge held that they did not, and apparently on two grounds — (1) that the rights of the debenture-holders had not become “crystallized,” the debentures not having become due, and no receiver for the debenture-holders having been appointed; and (2) that seizure of the company’s goods under execution was a dealing with such goods in the ordinary course of business, and did not contravene any rights of the debenture-holders, whose securities were, in his judgment, subject to the risk of such seizure. We have to consider whether this judgment is right. [His Lordship then stated the facts as above set out, and continued: —]

In this state of things the question is, Do the rights of the debenture-holders prevail against those of the executor creditor? It may seem hard upon the execution creditors that they should not be able to realize their judgment for their debt incurred in supplying trade goods for the purposes of the company’s business, and that they should be met by claims of debenture-holders of which they had no knowledge or public means of knowledge, and that such debenture-holders should be allowed to claim as theirs goods in the apparent control of the company, and upon which possibly, or indeed probably, credit had been given to them. But these are matters which concern the judgment and action of Parliament. We must determine the rights of litigants in conformity with what we believe to be the law. In our judgment, the rights of the debenture-holders do in this case prevail against the execution creditors. We cannot assent to the view of the learned county court judge that a seizure under an execution on a judgment against the company is a dealing by the company in the ordinary course of business within the third condition indorsed on the debentures, so as to be within the authority given to the company by the terms of the debentures. It is not in the ordinary course of business that the debts of a going business firm or company shall be liquidated by seizure of their assets under legal process. Nor can the transaction be properly described as a dealing by the company at all. It is a compulsory legal process directed against the company — not a dealing by them.

Does.

The second ground on which the learned county court judge proceeded was that the rights of the debenture-holders had not “crystallized,” or, in other words, that the moneys secured by the debentures had not become payable. As to this, it is in the first place to be observed that although this is so, yet by reason of the clause of the trust deed, previously set out, the security constituted by that deed had become enforceable by reason of the fact that an execution had been sued out against the company. But apart from this, the sheriff can only realize the judgment against the goods of the judgment debtor. Here the goods seized are validly charged with the payment of the amount of the debentures, and it is admitted that that charge far exceeds the value of

the goods in question. The rights of the execution creditors are subject, not only to the legal, but also to the equitable, rights of the debenture-holders. The sheriff cannot merely by seizing affect the rights of third persons to which property was subject when in the hands of the debtor, unless, indeed, such third persons have debarred themselves from the assertion of such rights. It follows, therefore, that there was no interest of the judgment debtor in the property seized available to satisfy the judgment debt. Nor is the debenture-holder prevented from asserting his charge upon the property in the circumstances of this case. The company as a going concern had come to an end, and although the due date of the debentures had not arrived, the holders were entitled to intervene to protect their security. Neither were they bound to apply for a receiver, or to proceed with a view to the winding-up of the company. They are entitled to say to the sheriff, "The goods seized are validly charged to us, and you cannot sell them to the prejudice of our security." No case has been cited to us, and we know of no case in which, in such circumstances as the present, the rights of the execution creditor have prevailed over those of debenture-holders.

It seems to us that this reasoning is fully supported by the authorities: see *In re Standard Manufacturing Co.*, in which case the rights of the debenture-holders had not "crystallized." See also *In re Opera, Limited*. The result is that the appeal will be allowed.¹

Appeal allowed.

BUTLER v. RAHM.

SUPREME COURT, MARYLAND, 1877.

[46 Md. 541.²]

BARTOL, C. J., delivered the opinion of the court.

This is an appeal from an order of the Circuit Court for Somerset County, continuing an injunction which had been issued at the instance of the appellee, complainant below, restraining the appellant from enforcing an execution upon a judgment recovered by "the National Iron Company" against "the Worcester and Somerset Railroad Company" which had been assigned to the appellant.

It has been contended on the part of the appellant that the mortgage evidences no valid or binding contract, that it is a mere voluntary contract on the part of the company without consideration which a court of equity will not enforce. This objection, in our opinion, is not well founded. It appears to be based on a misconstruction of the deed,

¹ Compare: *Re Panama Co.*, L. R. 5 Ch. App. 15; *Investment Co. v. Manilla R. R.*, 1897 A. C. 81; *Ketcham v. St. Louis*, 101 U. S. 306; *Howard v. Iron Co.*, 62 Minn. 299; *New York Co. v. Saratoga Co.*, 189 N. Y. 137; *Poland v. R. R.*, 52 Vt. 144. — Ed.

² Only one point is printed. — Ed.

taking as the consideration the recital it contains of the resolution of the board authorizing the bonds to be executed, and treating this suit as a proceeding to compel the company to carry out the resolution; whereas the real consideration is a security for the payment of the bonds of the company issued in conformity with the resolution. Though the deed does not state in terms, that the bonds had been executed, such is the plain inference from its provisions, and the fact is shown to be so. The object of the mortgage was to enable the company to dispose of its bonds advantageously in the market, by giving to the holders the security of a pledge of its property and profits. There can be no possible objection to the deed being made to third persons as trustees for the benefit of the bondholders. It is in effect a contract between the company and all persons who might become holders of the bonds thereby secured, and they are entitled to the same benefit as if they were parties to the deed.

The appellee being a bondholder, entitled to priority over the judgment creditor, there can be no question of the propriety of continuing the injunction. His right to this relief is shown by the cases before cited, especially by *Coe v. Pennock*; *Mason v. York & Cumberland R. Co.*; *Philadelphia, W. & B. R. Co. v. Woelpper*; *Ludlow v. Hurd*, and *State v. N. C. R. Co.*, 18 Md. 193.

The exception to the bill as multifarious cannot be supported; this objection has not been made at the proper time nor in the proper form; but however made, the bill is not, in our judgment, obnoxious to this objection.

The ruling of the Circuit Court upon the several exceptions of the appellant to the testimony are affirmed. We shall affirm the order, continuing the injunction, and remand the cause.

*Affirmed, and cause remanded.*¹

¹ Compare: *Canada R. R. v. Gebhard*, 109 U. S. 527; *Richardson v. Greene*, 133 U. S. 30; *Gates v. R. R. Co.*, 53 Conn. 333; *Cable Co. v. Mfg. Co.*, 164 Mass. 274; *Shepley v. R. R.* 55 Me. 397; *Sickles v. Richardson*, 23 Hun, 559; *Railroad v. Woelpper*, 64 Pa. St. 366; *National Bank v. Wood Paper Co.*, 19 R. I. 149; *Bank v. Laurence Co.*, 96 N. C. 298; *Wade v. Brewing Co.*, 10 Wash. 284. — Ed.

DIVISION II. — MORTGAGE IN SUBSTANCE.

SECTION I. — ABSOLUTE GRANT.

MANLOVE v. BALE AND BRUTON.

CHANCERY, 1688.

[2 Vern. 84.]

ONE Bruton having a church lease for three lives in 1664, conveyed and assigned it to the defendant Bale's father, in consideration of £550 the conveyance was absolute. But Mr. Bale the purchaser by writing under his hand and seal agreed, that if Mr. Bruton the vendor should, at the end of one year then next ensuing, pay him £600, that he would reconvey: the £600 was not paid, and two of the lives died, and the lease was twice renewed by the defendant Bale and his father; and now it was near twenty years after the first conveyance. Bruton being a prisoner in the Fleet, and indebted to the Warden for chamber-rent, assigns to him all his right, title, interest, equity and power of redemption; and thereupon the plaintiff Manlove, the Warden of the Fleet, brought his bill to redeem and to have an account of the rents and profits of the premises.

The defendant insisted on his title, and that the estate was not now redeemable, nor ought he to account for the profits.

But notwithstanding the Master of the Rolls decreed a redemption on payment of the £550 which was the first consideration-money, as also the fines paid upon the renewal of the leases, which moneys were to be paid with interest, and the account of profits was to commence but from the death of Peter Bale, who was the purchaser, and father of the defendant, and until that time the profits were to be set against the interest of the £550 consideration-money.¹

¹ Compare: *Franklin v. Frame*, Barn. Ch. 30; *Hughes v. Edwards*, 9 Wheat. 469; *Scott v. Henry*, 13 Ark. 112; *Ingram v. Illges*, 98 Ala. 511; *Sears v. Dixon*, 33 Cal. 326; *Edrington v. Harper*, 3 J. J. Marsh. 353; *Leutz v. Martin*, 75 Ind. 228; *Howe v. Austin*, 40 La. Ann. 323; *Kent v. Allbritain*, 5 Miss. 317; *Lund v. Lund*, 1 N. H. 39; *Bloodgood v. Zerly*, 2 Carnes, 124; *Gano v. Marshall*, 7 Humph. 121; *Bank v. Bank*, 7 Watts & S. 335; *Miller v. Yturria*, 69 Tex. 549; *Green v. Pierce*, 60 Wis. 372. — ED.

WHITFIELD v. PARFITT.

CHANCERY, 1851.

[15 *Juris*, 852.]

THIS was a suit instituted for the redemption of eight sixty-fourth shares in a certain steam-tug, called "The Stockton," registered at the port of Bristol. It appeared by the evidence, that in the month of March, 1845, the defendant Parfitt lent to the plaintiff £100, and it was agreed that the repayment should be secured by an assignment of the eight sixty-fourth shares in question. A bill of sale was accordingly prepared, dated the 2d April, 1845, purporting on its face to be an absolute bill of sale, but there was indorsed on it a memorandum, also dated the 2d April, 1845, to the effect, "that on the plaintiff repaying to Parfitt the sum of £100, and interest at £5 per cent, then and in that case the bill of sale should be null and void, and of no effect whatever." This memorandum was signed by the plaintiff, and by the wife of the defendant Parfitt for him. In the month of January, 1846, the plaintiff paid to the defendant the interest due on the £100, and the defendant gave him a receipt for such interest. In July, 1846, the defendant procured the bill of sale to be registered, and the entry on the certificate of registry took no notice whatever of the indorsement, but treated the instrument as an absolute transfer. The plaintiff, hearing of this, made application to the custom-house authorities on the subject, but, being unable to produce the bill of sale, which was in Parfitt's possession, without effect. In the month of October, 1846, Parfitt transferred, by bill of sale, to John Jones, of Bristol, the other defendant; whereupon the plaintiff filed his bill for redemption, and for an injunction to restrain the registry of the transfer to Jones. The injunction was obtained, and the cause now came on for hearing.

Knight Bruce, V. C. The first question is, whether the bill of sale and the indorsement upon it, are to be taken as contemporaneous instruments, or contemporaneously signed by those who signed those instruments, if the word "instruments" can properly be used in the plural. I am of opinion that, upon the evidence, they must be taken to be so. The next question is, whether, inasmuch as the indorsement was signed, not by the defendant Parfitt, but by his wife, it is to be taken, on this evidence (including especially the receipt), that she signed it as his agent and upon his authority. I am of opinion that the just and inevitable inference from the evidence is, that she did sign it as his agent and by his authority. That being so, the case stands in the same position, in my judgment, as if the memorandum or indorsement had been signed by Mr. Parfitt himself. The next consequence that follows is, that, in my judgment, the indorsement is as much a part of the deed upon which it was written as if it

had been inserted in the front of the papers, in the middle, or in any other part of the deed. Supposing that view of the case to be correct, the instrument is, to all intents and purposes, a mortgage. It has, however, been registered and entered in the custom-house books in such a form as not to mention whether it is a sale or a mortgage; and a bill of sale may be a description of a conveyance or assurance as applicable to a transaction which is not a sale, in the colloquial sense of the expression, as to one that is; and the question is, whether the circumstance that it is not mentioned in the manner that I have stated, as a mortgage or security for money, is to invalidate the transaction. I am of opinion that that cannot be contended for successfully upon any part of the act of Parliament, unless on the 45th section; and I am also of opinion that the 45th section was not intended to invalidate, and does not invalidate, such a transaction. There are two views of this case: one, that, the act not having been obeyed, the legal interest never has been effectually taken out of the plaintiff. If that is the fair view, which I do not say, the plaintiff nevertheless has a right to come here, he submitting to redeem, for the purpose of taking the cloud off his title. If, however, the legal interest has been taken out of him, then I say it has not been so taken out of him as by law to exclude his right of redemption. The case of Jones has not a right to stand higher than that of Parfitt. The consequence is, that there must be redemption upon the usual terms, except that, as to the costs occasioned by denying or disputing the right of redemption, those costs must be separated, and paid to the plaintiff: the one set must be placed against the other. I think that the law has been too much for dishonesty in this case. I continue the injunction, because I think it fit in the present state of the circumstances.¹

ENGLAND v. CODRINGTON.

CHANCERY, 1758.

[1 *Eden*, 169.]

THIS was a bill brought by the plaintiffs (all of the name and family of England, who were entitled to certain premises at Marshfield in the county of Gloucester, under various family transactions)

¹ Compare: *Cottrell v. Purchase*, Cas. T. Talbot, 61; *Farns v. King*, 27 Ark. 404; *Booth v. Hoskins*, 75 Cal. 271; *Walker v. Mining Co.*, 2 Col. 89; *French v. Lyon*, 2 Root, 69; *Gibson v. Hough*, 60 Ga. 588; *Scott v. McWorter*, 49 Ia. 427; *Helburg v. Schurman*, 150 Ill. 12; *Heath v. Williams*, 30 Ind. 495; *McLaughlin v. Shepard*, 32 Me. 143; *Murphey v. Calley*, 1 Allen, 107; *Archanbau v. Green*, 21 Minn. 520; *Tibean v. Tibean*, 22 Mo. 77; *Webb v. Hoselton*, 4 Neb. 388; *Cornell v. Pierson*, 4 Halst. 478; *Brown v. Nickel*, 6 Pa. 390; *Moors v. Wiles*, 69 Tex. 109; *Plato v. Roe*, 14 Wis. 453. — Ed.

against Sir William Codrington, for an account of the rents and profits, and a redemption, &c.

THE LORD KEEPER. I am of opinion, upon the proofs in this cause, and particularly from the answer of Sir William Codrington, that the agreement, bearing date the 18th of July, 1751, was not for the sale of the premises therein mentioned, but was only an agreement to convey the estates to Sir William and his heirs, redeemable at a certain time, and particular event, upon payment of the money with interest, which ought to have been inserted in the agreement; and appears to me to have been fraudulently omitted by the drawer of it.

I am therefore of opinion that the conveyances are not to be considered in this court as absolute conveyances, but as securities for the money advanced by Sir William Codrington, together with interest, according to the rate of interest which the several mortgages paid off by him bore; and the defendant having insisted on the same as absolute conveyances, contrary to the real truth of the transaction, and thereby occasioned this suit; let the Master tax the plaintiffs their costs to this time, &c.

*Usual decree for an account, &c.*¹

STRONG v. STEWART.

COURT OF CHANCERY, NEW YORK, 1819.

[4 Johns. Ch. 167.]

BILL to redeem mortgaged premises. The defendant set up an absolute sale, by an assignment, absolute in terms, of the right of Mitchell in the land, and denied the fact of a loan. But the defendant, at the same time, admitted in his answer, that after the assignment was executed he gave Mitchell, at his request, time to return the money, and take back the assignment.

Parol proof was taken, which established, conclusively, the fact of a loan, and not a purchase and sale; and that the assignment was made, given and received, by way of security for a loan.

THE CHANCELLOR. On the strength of the authorities, and on the proof of the loan, and of the fraud, on the part of the defendant, in attempting to convert a mortgage into an absolute sale, I shall decree an existing right in the plaintiffs to redeem. The cases of *Cotterell v. Purchase*, *Cases temp. Talbot*, 61; *Maxwell v. Mountacute*, Prec.

¹ Compare: *Floyer v. Lavington*, 1 P. Wms. 268; *Morris v. Nixon*, 1 How. 118; *Hudson v. Iskel*, 5 Stew. & P. 67; *Jordan v. Fenno*, 13 Ark. 593; *Lee v. Evans*, 8 Cal. 424; *Hall v. Wallis*, 66 Ga. 483; *Reilly v. Brown*, 87 Mich. 163; *McClain v. White*, 5 Minn. 178; *Norris v. McLain*, 104 N. C. 159; *Carter v. Walker*, 1 Murphey, 488. — Ed.

in Chancery, 526; Washburn v. Merrill, 1 Day's Cases in Error, 139; and the acknowledged doctrine, in 2 Atk. 99. 258; 3 Atk. 389; and 1 Powell on Mortg. 104 (4th London edit.) are sufficient to show, that parol evidence is admissible in such cases, to prove that a mortgage was intended, and not an absolute sale, and that the party had fraudulently perverted the loan into a sale. In this case, the admissions in the answer were sufficient to presume a mortgage, against the absolute terms of the assignment. *Decree accordingly.*¹

SALT v. MARQUESS OF NORTHAMPTON.

HOUSE OF LORDS, 1892.

[1892 P. C. 1.]

APPEAL from a decision of the Court of Appeal reported as Marquess of Northampton v. Pollock.

The appeal arose in an action brought by the Marquess of Northampton as administrator of the late Earl Compton against Henry Pollock, J. C. Salt, and Sir H. W. Tyler, who were Trustees of the National Life Assurance Society.

By a bond and disposition in security in Scotch form dated the 26th of May, 1879, the late Earl Compton, being the heir of entail next entitled after the death of his father (the plaintiff) to certain real estates in Scotland, in consideration of the sum of £10,000 advanced to him by the defendants, bound himself, his heirs, executors, and representatives to pay the defendants that sum at Martinmas, 1879, (with a fifth part more of liquidate penalty in case of failure) and interest on the said sum at 5½ per cent per annum, and thereafter half yearly during the non-payment of the principal sum to pay interest at the rate aforesaid with the like liquidate penalty. He also bound himself, so long as the principal sum or any part thereof should remain unpaid, to pay the defendants the annual sum of £435 5s., being the premium of a policy of assurance effected by the defendants on his life as against that of his father in the National Life Assurance Society for £34,500; also that if he should at any time not pay one or more of the

agreement to back policy failed in substance a mortgage.
J.P. W.

¹ Compare: Cripps v. Gee, 4 Bro. C. C. 472; *Re Duke of Marlborough*, 1894, 2 Ch. 133; Peugh v. Davis, 99 U. S. 332; Edwards v. Rogers, 81 Ala. 568; Anthony v. Anthony, 23 Ark. 479; Taylor v. McLain, 67 Cal. 513; Adams v. Adams, 51 Conn. 544; Bank v. Ashmead, 23 Fla. 379; Curtis v. Halloran, 61 Ga. 314; Turpie v. Low, 114 Ind. 37; Ruckman v. Alwood, 71 Ill. 155; McDonald v. Kellogg, 30 Kans. 170; Knapp v. Barley, 79 Me. 195; Artz v. Grove, 21 Ind. 456; Campbell v. Dearborne, 109 Mass. 131; McMillan v. Bissell, 63 Mich. 66; Marshall v. Thompson, 39 Minn. 137; Klein v. McNamara, 54 Miss. 90; Eisemann v. Gallagher, 24 Neb. 79; Frink v. Adams, 36 N. J. Eq. 485; Barry v. Hamburg Co., 110 N. Y. 1; Green v. Sherrod, 105 N. C. 197; Kempen v. Campbell, 44 Ohio St. 210; Pearson v. Sharp, 115 Pa. 254; Carter v. Evans, 17 S. C. 458; Lovering v. Milliken, 59 Tex. 423; Edwards v. Ware, 79 Va. 321. — Ed.

² This case is abridged. — Ed.

premiums it should be in the power of the defendants to pay such premiums themselves and to charge the amount so paid against him in like manner as the principal sum. And in security of the personal obligation therein written he assigned his reversionary interest in the aforesaid real estates to the defendants in the manner therein mentioned reserving power of redemption.

Earl Compton died in 1887 without ever paying anything.

The statement of claim referred to the above-mentioned documents and claimed (*inter alia*) a declaration that the defendants were entitled to the policy and the sums assured thereby as a security only for the £10,000 with interest and for the premiums with interest, and also claimed an account and inquiry and payment of the balance after deducting what should be found due.

EARL OF SELBORNE. My Lords, my opinion in this case has undergone some fluctuation, owing perhaps to the manner in which it was presented to your Lordships. Usually, in questions of this kind, there is some evidence of facts, in addition to what may be collected from the instruments executed to give effect to the contract between the parties. Here, your Lordships have nothing beyond those instruments themselves, and the pleading of the appellants in their "defence," which is to be taken as admitted, subject to such explanation or correction as it may receive from the documents.

The facts, that the policy of insurance was for more than three times the amount of the debt, and that no premiums were ever paid by the debtor (an event which was contemplated and provided for as probable), seemed to me for some time to have an aspect favorable to the appellants. They would, certainly, have been as consistent with an intention that the policy should be effected for the creditor's protection only, and for his sole benefit, subject to an option for the debtor to make it his own, in the event (not anticipated) of his paying off the debt in his lifetime, as with an intention that it should belong to the debtor, subject to the security for the purpose of which it was effected. The question is, which of these contracts is to be inferred from the terms of the instruments creating the security? In favor of the former, there is nothing else, except the statement in the "defence," and the stipulation itself, of which the validity or invalidity in point of law is now to be determined.

It was considered by all the judges in the court below, and it was admitted (I think rightly) at your Lordships' bar, that the case must be decided in the same way as if the policy had been effected in any other office, and not (as it was) in the office of the creditors. The creditors might, and probably they did, reinsure in some other offices or office. And I think it is also immaterial for the purpose of the present question, that the debtor did not pay the premiums, or any of them, and that the probability of his failing to do so was provided for by the contract. He bound himself to do so; he was, as between himself and the appellants, chargeable with those premiums, which must,

for the present purpose, be treated as advanced to him by way of loan, just as much as the principal sum of £10,000. If, as things stand, the appellants are not mortgagees of the policy, and are not bound (the whole debt, interest, and premiums being satisfied out of its proceeds) to account for the surplus to the respondent, as the debtor's personal representative, their situation would have been the same if every single premium had been paid by the debtor in his lifetime.

If the policy, which was certainly effected for the purpose of being made (in some sense) a security to the appellants, belonged (subject to that security) to the debtor, and if the appellants ought to be regarded as mortgagees of that policy, it is admitted that a stipulation, that, in the event of the debtor dying without having paid off the debt, the policy should not be redeemable, would be void; and, upon the same supposition, it is not less clear that this is the character of the stipulation now in question. The only question is, whether the debtor was, in fact and in law, mortgagor of, and entitled to redeem this policy. This he could not be, unless he had an interest in it which he could and did make a security to the appellants.

If the question is to be determined by what appears upon the face of the bond and disposition in security of the 26th of May, the minute of agreement of the 26th and 28th of May, and the supplementary agreement of the 14th of June, 1879, taken all together, and read in the light of the appellants' acknowledgment at your Lordships' bar, that the supplementary agreement was not intended to make Lord Compton's representatives liable to be sued for the whole debt while the whole proceeds of the policy were retained by the appellants, I cannot escape from the conclusion that the parties did stand to each other, in respect of this policy, in the relation of mortgagor and mortgagee.

I am unable to dissent from the view taken by NORTH, J., and by the majority of the judges in the Court of Appeal; and I propose to move your Lordships that the order appealed from be affirmed, and the appeal dismissed with costs.¹

MILLER v. THOMAS.

SUPREME COURT OF ILLINOIS, 1853.

[14 Ill. 428.]

CATON, J. After a careful consideration of the evidence in this case, we are inclined to concur with the court below, that this transaction

¹ Compare: *Holland v. Smith*, 6 Esp. 11; *Drysdale v. Peggott*, 8 D. M. & G. 546; *Moreland v. Isaac*, 20 Beav. 389; *Godsall v. Webb*, 2 Keen, 100; *Bank v. Lobe*, 104 Ga. 446; *Amick v. Butler*, 111 Ind. 578; *Butler v. Smith*, 70 Md. 261; *Matthews v. Shehan*, 69 N. Y. 164; *McHall v. McDonald*, 175 Pa. 632; *Cheever v. Anders*, 87 Tex. 287. — WAMBAUGH: CASES ON INSURANCE, 1867 n.

should be treated as a mortgage. Edwards was indebted to Brown upon a note executed by himself and Dawson, in the sum of \$195, which he was not prepared to pay; and it is evident that a negotiation was had between the parties for further time, which had resulted in an agreement upon terms, except as to the nature of security. Upon this subject, Shephard was consulted, who suggested, that if he took a mortgage it would take as long to collect it as it would to sue the note. He then said he would buy the land, but in such a way that he could sell it at a certain day, for he would not have his money out of his hands, beyond his control. The result was a conveyance of the land from Edwards, and an agreement for a resale or conveyance, upon the payment of the amount due upon a certain day. There is much evidence given of the declarations of the parties, as to their intentions, made not only at the time of the transaction, but subsequently, which it is unnecessary to recapitulate minutely. As is generally observed in such cases, the strength of the declarations testified to vary very much, according to the inclination of witnesses, and the form of the questions put to them, eliciting the answers. Upon the whole, it is manifest, that it was the intention of both parties to provide the strongest security possible for the payment of the money designed to be secured, at the day stipulated; but, after all, it was only as security that the conveyance was made. While, on the one hand, Edwards stated, if he did not pay the money at the time agreed upon, he must lose his land; on the other, Brown stated, that he held the land as security for the payment of the money. The original note was probably given up at the time the deed was made, but the amount to be paid was specified in the agreement to reconvey, which constituted the defeasance. That contained a covenant on the part of Edwards to pay the amount of the note, with twelve per cent. interest. This covenant to pay \$195, with interest, superseded the necessity of retaining the note, and made it proper and consistent that it should be given up. In cases of this sort, the real character of the arrangement may as often be gathered from the nature of the transaction and character of the circumstances as from the express declaration of the parties. These, when considered, can leave the mind in but little doubt on the subject. It is manifest, beyond contradiction, that Brown did not wish to become the real purchaser of the land; but he wanted his money at the time agreed upon. Edwards did not wish to part with the land, but desired to give Brown the most perfect security upon it, that the money should be promptly paid. The value of the land, as compared with the amount of money to be paid, is strongly indicative of the character of the transaction. The land was worth from \$600 to \$800, while the money due and to be secured was but about \$200. Both parties expressed the intention at the time of the transaction, that if the money was not paid at the day stipulated, Brown should have the right to sell the land to the first purchaser, to raise the money. Could it have been the intention of the parties, that Brown should retain the

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Evidence*

surplus of the money to be realized for the land after paying the amount due him? That would clearly have been carrying the transaction beyond the evident intention of both parties. No speculation was designed for Brown, but a security that he should certainly realize his money. If that was the case, then the arrangement amounted to a mortgage. If it was a mortgage at the time, it must ever bear that character. The agreement to reconvey upon the payment of the amount for which the conveyance was made, with interest, was made at the same time of the conveyance, and in pursuance of the same agreement, and was a part of the same transaction; and they must both be taken together, as constituting one entire arrangement, as much so, indeed, as if they had both been written upon the same piece of paper, and expressly referring to each other. Had they been thus executed, they would have constituted a mortgage, not only in substance, but in form also. A court of chancery disregards the form, and seeks for the substance of the transaction. It is by no means necessary, in order to constitute a mortgage, that the deed and defeasance should be contained in the same instrument, or that they should even refer to each other. Their connection may be shown by parol. Indeed, it is not absolutely necessary that the defeasance should be in writing at all. The conveyance may be absolute on its face, and yet it may be shown, by parol, that it was intended only as a security for the payment of money, when it will be treated in equity as a mortgage. These principles are too familiar to require authorities for their support.

*Decree reversed.*¹

GOODMAN v. GRIERSON.

COURT OF CHANCERY OF IRELAND, 1813.

[2 Ball & B. 274.]

BILL FOR REDEMPTION. James Goodman, the father of the plaintiff, being seised of the lands of Creaghmore, subject to a charge of £1,000, to his sister Sarah, the wife of Ralph Higgins, on the 13th of December, 1788, conveyed his interest in those lands to trustees, for Higgins and wife; the deed recited, that the trustees, with the consent and approbation of Higgins and wife, had agreed to accept of the lands of Creaghmore, in lieu and satisfaction of the sum of £1,000, and that James Goodman, in consideration thereof, and in lieu and satisfaction of the said sum of £1,000, had agreed to assign

¹ Compare: *In re Allison*, 11 Ch. D. 224; *Stokes v. Venner*, 3 Swanst. 634; *Knauss v. Dreher*, 84 Ala. 319; *Locke v. Moulton*, 96 Cal. 21; *Chaires v. Brady*, 10 Fla. 133; *Voss v. Elles*, 109 Ind. 260; *Tucks v. Lindsay*, 18 Ia. 504; *Spence v. Steadman*, 49 Ga. 133; *Oldham v. Halley*, 2 J. J. Marsh. 113; *Pearson v. Sharp*, 115 Pa. St. 254; *McCauley v. Smith*, 132 N. Y. 524; *Wing v. Cooper*, 37 Vt. 169; *Chapman v. Turner*, 1 Call., 280. — ED.

his interest in the lands to the trustees; but subject to redemption as thereafter mentioned. The deed then contained a covenant, that if James Goodman, his heirs, &c., should at any time after, within the space of ten years next ensuing the date thereof, pay the said sum of £1,000, that the trustees would reconvey to him the lands.

THE LORD CHANCELLOR. The fair criterion, by which the court is to decide whether this deed be a mortgage or not, I apprehend to be this, are the remedies mutual and reciprocal? Has the defendant all the remedies a mortgagee is entitled to? I conceive he has not. Suppose, for instance, the defendants to file a bill of foreclosure, by the practice of this court, the decree is for a sale of the mortgaged premises, if they be not redeemed within the time limited by the course of the court; suppose the sale to take place, and the produce to be insufficient to discharge the £1,000, and costs, how is the deficiency to be raised? What remedy could the defendant then have? If it were a mortgage, he in that case might proceed on his covenant or bond; or if no covenant or bond, upon the implied assumpsit; but how could any action be maintained in this case, where the defendants have taken the conveyance, not as a security, but expressly in lieu and satisfaction of the portion of £1,000. This appears to me decisive to show, that the transaction between these parties was not that of a mortgage, but a conditional sale; for if the defendants have not all the remedies of a mortgagee, why am I, contrary to the express provisions of this deed, to hold it to be a mortgage, and to extend the condition beyond the limit agreed upon by the parties to this deed? There would be much hardship and inconvenience to the one party; and there appears to me to be no substantial ground to entitle the other to relief. The cases upon this subject are collected by Mr. Butler in a note to his edition of Coke upon Littleton.

Bill dismissed without costs.¹

EARP v. BOOTHE.

COURT OF APPEALS, VIRGINIA, 1874.

[24 Gratt. 368.]

THE case is stated in the opinion of the court.

CHRISTIAN, J., delivered the opinion of the court.

It is often difficult to distinguish a conditional sale from a mortgage.

¹ Compare: Longuet v. Scawen, 1 Ves. 405; Perry v. Meadowcroft, 4 Beav. 192; Neal v. Morris, Beat. 597; Barton v. Bank, 15 A. C. 379; Bogk v. Gassert, 149 U. S. 17; West v. Hendrix, 28 Ala. 226; Hillhouse v. Dunning, 7 Conn. 143; Foster v. Green, 142 Ill. 80; Reynolds v. Davidson, 27 Ind. 296; Bacheller v. Bacheller, 144 Ill. 471; McNamara v. Culver, 22 Kans. 661; Hancock v. Carlton, 6 Gray, 39; Brant v. Robertson, 16 Mo. 129; Cornell v. Hall, 22 Mich. 377; Randall v. Saunders, 87 N. Y. 578; Bethlehem v. Harris, 40 N. H. 34; Fisher v. Witham, 132 Pa. 488; Floyd v. Robinson, 2 Rob. 161; Rich v. Doane, 35 Vt. 125. — ED.

The line of discrimination is confessedly indistinct, and each case must in a great measure depend upon its own peculiar circumstances. Generally speaking the difference between them is, that the one is a security for a debt, the other a purchase for a price paid, or to be paid, to become absolute in a particular event; or a purchase accompanied by an agreement to resell upon particular terms. The only difficulty is to ascertain the character of the transaction. It may be premised that where upon the face of the transaction it is doubtful whether the parties intended to make a mortgage or a conditional sale, courts of equity will always incline to consider it a mortgage, because by means of conditional sales oppression is frequently exercised over the needy, and they are too often made the vehicle of extortion. 1 Hilliard on Mortgages, 85, and cases there cited; Poindexter v. McCannon, 1 Dev. Eq. R. 375-376.

But this court has fixed the *criteria* which must govern in determining the character of the transaction, whether it is to be considered a conditional sale or a mortgage. In the case of Robertson v. Campbell & Wheeler, 2 Call, 421, PENDLETON, J., said: "It is often a nice and difficult question to draw the line between mortgages and conditional sales. But the great *desideratum* which this court has made the ground of their decision, is, whether the purpose of the parties was to treat of a purchase, the value of the commodity contemplated, and the price fixed; or whether the object was a loan of money, and a security or pledge for the repayment intended." This rule, laid down by Judge Pendleton, has been adopted in several cases decided by this court. See King v. Newman, 2 Munf. 40; Moss v. Green, 10 Leigh, 251; 2 Rob. Prac. (old ed.) 51, and cases there cited.

Tried by these *criteria* and the authorities above cited, it is plain, that (except as to the small tract of thirty or forty acres, which was purchased at a stipulated price, Boothe agreeing, as to that, to take the shoes of Earp, as purchaser from Brightwell) the transaction between the parties must be treated, as to the main tract, as a mortgage, and not as a conditional sale. As to this part of the land, there was no negotiation as to the price. Nothing was said as to its value. The negotiation was for a loan of money; and it is so treated by the plaintiff in his bill. He says, after setting forth the purchase of the land by Earp from Brightwell: "Some time in the year 1862 the said Earp, finding he was unable to pay for it, applied to your orator to advance for him to Brightwell the said sum of \$700.00, with interest," &c. The defendant, in his answer, says that he applied to plaintiff to borrow the money to pay Brightwell for the land purchased of him; and that the only terms upon which the plaintiff would agree to lend respondent, was upon the terms set forth in the covenant filed with the bill. It is thus clear that the transaction between the parties was a borrowing and lending of money, and not for a sale of the land, except as to the small quantity above referred to. The only object of the negotiation was a loan of money, and security for its repayment. In such cases the con-

tract will be treated as a mortgage, and not a sale. Such is the unwillingness of courts of equity to sustain forfeitures and limit the right of redemption, that it will never be done, in a case where it appears that the first object of the party was to borrow money and not to sell property.

The decree of the Circuit Court must be affirmed. *Decree affirmed.*¹

DAVIS v. THOMAS.

CHANCERY, 1830.

[1 *Russ. & M.* 506.]

THE plaintiff, being entitled to the equity of redemption of a certain estate, conveyed the same by a deed of release, dated the 29th of September, 1820, to Mrs. Twynning, the mortgagee, in consideration of £1,800, which was made up of the mortgage debt, and of an additional sum of money paid to him. On the 1st of January, 1821, the mortgagee demised the estate to the plaintiff for a term of ninety-nine years, determinable on the death of the survivor of him, his wife, and son, at a rent of £105, payable half-yearly at Lady-day and Michaelmas; and on the lease there was indorsed an agreement signed by the mortgagee, by which it was stipulated, that, in case the plaintiff regularly paid the rent due at Lady-day by the 4th of June, and the rent due at Michaelmas by the 26th of October, he should be at liberty to repurchase the premises at the price of £1,850, at any time within five years; but if default were made in the payment of the rent within the stated periods, the agreement was to be void. The plaintiff failed in the payment of his rent at the periods stated, and distresses for it had been levied on the premises; but, within the five years, he applied to repurchase, and at the same time tendered the arrears of rent then due. The defendant refused to permit the repurchase; and the bill was filed by the plaintiff to have the benefit of the stipulation in that respect, or to be let in to redeem.

THE MASTER OF THE ROLLS. In all cases of the payment of money, where penalty or forfeiture is introduced for the purpose of security, there a court of equity will relieve against the penalty or forfeiture, upon the ground of full compensation by giving interest. But where there is

¹ Compare: *Watts v. Kellar*, 56 Fed. 1; *Hughes v. McKenzie*, 101 Ala. 415; *Trappnell v. Brown*, 19 Ark. 39; *Purdy v. Bullard*, 41 Cal. 444; *Lindsay v. Matthews*, 17 Fla. 575; *Union Co. v. White*, 106 Ill. 67; *Rogers v. Davis*, 91 Ia. 730; *Cruther v. Heard*, 4 Bush, 360; *McPherson v. Heyward*, 81 Me. 329; *Fowler v. Price*, 17 Pick. 100; *Holton v. Mergen*, 15 Minn. 69; *Keiser v. Gamrudt*, 95 Mo. 217; *Leahigh v. White*, 8 Mo. 147; *Ryan v. Dox*, 34 N. Y. 307; *Vestal v. Sloan*, 76 N. C. 127; *Heath's Appeal*, 100 Pa. 1; *Jensher v. Cook*, 9 R. I. 520; *Brownlee v. Martin*, 28 S. C. 364; *Jourdan v. Fox*, 90 Wis. 99. — Ed.

no stipulation for penalty or forfeiture, but a privilege is conferred, provided money be paid within a stated time, there the party claiming that privilege must show that the money was paid accordingly: as in a case of interest reserved on a loan at 5 per cent with a proviso that 4 per cent will be accepted, if paid within a limited time after it becomes due; or in the case of a covenant for the renewal of a lease on the payment of a certain fine at a stated period. Here it is admitted that the rent was not duly paid at the stipulated times, and no fraud, surprise, or accident is alleged; and the plaintiff is, therefore, not entitled to the repurchase which he claims by this bill; and the bill must be dismissed with costs.¹

HAWKE v. MILLIKEN.

COURT OF CHANCERY, UPPER CANADA, 1866.

[12 *Grant Ch.* 236.]

MOWAT, V. C. I think it clear that the contention of the defendant is well founded. The agreement does not merely give an option to Norman to repurchase, but it contains an express and absolute undertaking on his part to buy, and to pay for the property the sum specified. Now I understand that the distinction between an option to repurchase and an obligation to purchase, is the very distinction on which, in the absence of other circumstances, this question of mortgage or sale may depend; that a mere option to the grantee to purchase, though stipulated for at the time of executing the conveyance, is not sufficient to establish the transaction as a mortgage; but that when an obligation to purchase and pay the money is exacted from the grantee, that is sufficient to show the real character of the transaction to be a mortgage, though the form of it is a sale. There is indeed nothing but the form to distinguish the latter case from a mortgage. In the present case, the plaintiff had every remedy which as mortgagee he could have. In case of default, he could enforce payment of the money, or bring an ejectment for the possession of the property. It was not contended that, had the transaction been in form of a mortgage, the plaintiff would have been entitled to a more advantageous decree in any respect than he is now.

There will, therefore, be the usual decree for a foreclosure or sale (at the option of the plaintiff), except as to costs.

¹ Compare: *Williams v. Owen*, 5 Myl. & Cr. 305; *Shaw v. Jeffrey*, 13 Moo. P. C. 432; *O'Reilly v. O'Donoghue, Jr.* 10 Eq. 73; *Conway v. Alexander*, 7 Cranch, 218; *Flagg v. Mann*, 2 Sumn. 533; *Haynie v. Robertson*, 58 Ala. 32; *Henly v. Hotelling* 41 Cal. 22; *Hughes v. Scheaft*, 19 Ia. 335; *Spence v. Steadman*, 49 Ga. 133; *Mason v. Moody*, 26 Miss. 184; *Ass'n v. Bank*, 157 Ill. 524; *Stowe v. Banks*, 123 Mo. 672; *Reed v. Bond*, 96 Mich. 134; *Robinson v. Cropsey*, 2 Edw. Ch. 138; *King v. Kincey*, 36 N. C. 187; *Slutz v. Desenberg*, 28 Ohio St. 371; *Hickman v. Quinn*, 6 Yerg. 96; *Glen-denning v. Johnson*, 33 Wis. 347. — ED.

In taking the account, the defendant will have credit for his costs up to the hearing, for the answer would have been unnecessary but for the claim on the part of the plaintiff which I have adjudged against him. The plaintiff is entitled to his costs, except so much thereof as has been occasioned by his not admitting the transaction to be a mortgage.¹

LOGUE'S APPEAL.

SUPREME COURT, PENNSYLVANIA, 1883.

[104 Pa. St. 136.]

THIS was an appeal by John Logue, Sr., from a decree declaring a certain sheriff's deed to him, absolute on its face, to be a mortgage, and enjoining him from conveying or encumbering the premises, &c.

MR. JUSTICE STERRETT delivered the opinion of the court.

The question then is, whether upon the facts thus established the appellee was entitled to a decree declaring the sheriff's deeds to be in fact mortgages, and ordering appellant, upon payment of the money secured thereby, to convey the legal title to the land therein described to the appellee. In some of its features the transaction differs from the familiar case of an absolute conveyance of land by the holder of the legal title, as security merely, and so intended by the parties thereto; but, in principle it is the same. Equity regards the substance rather than the form of a transaction. By his purchase at the sheriff's sales, appellee acquired an inceptive title to the land in question, which by payment of purchase money and delivery of deeds would have ripened into a complete legal title. He had such an interest as would have been bound by the lien of a judgment entered between the date of sale and the acknowledgment and delivery of the sheriff's deeds. But, instead of taking the deeds in his own name and then mortgaging the land to secure the loan made by appellant, it was suggested by the latter that the deed should be made directly to him, as security for the loan. This was agreed to and the arrangement was carried out. The manifest purpose of this was not to vest title absolutely in appellant, but to enable appellee to raise money to pay his bid, by pledging the land as security for its repayment. Appellant's subsequent repudiation of the agreement, under which the deeds were made to him directly, and his attempt to use the deeds

¹ Compare: *In re Allison*, 11 Ch. D. 224; *Russell v. Southard*, 12 How. 139; *Crews v. Threadgill*, 35 Ala. 334; *Scott v. Henry*, 13 Ark. 112; *Bacon v. Brown*, 19 Conn. 34; *Bull v. Coe*, 77 Cal. 54; *Parmalee v. Lawrence*, 44 Ill. 405; *Bauer v. Merryman*, 32 Md. 185; *Overstreet v. Baxter*, 30 Kans. 55; *Phillips v. Melzier*, 20 N. J. Eq. 398; *Teedler v. Darwin*, 50 N. Y. 437; *Henry v. Davis*, 7 Johns. Ch. 40; *Kellwell v. Smith*, 33 Pa. St. 158; *Herst v. Eppstern*, 71 Tex. 752; *Davis v. Demming*, 12 W. Va. 246; *Suavelly v. Pickel*, 29 Gratt. 27. — Ed.

for a purpose that was never intended when he obtained them, is a palpable fraud, against which equity, under the facts and circumstances found by the Master, will undoubtedly afford relief.

The decree of the court below declaring that the sheriff's deeds be taken and held to be mortgages, given to appellant, to secure the payment of the \$6,110 loan, made by him to appellee in August 23, 1879, and enjoining appellant from conveying or encumbering the premises, &c., is correct as far as it goes, but it does not go quite far enough. It should also provide that upon repayment of the loan, or so much thereof as remains unpaid, within a reasonable time, appellant shall convey the land in fee to appellee, by deed, with covenant of special warranty against all acts done or suffered by himself. This decree may be enforced by attachment, or a Master may be appointed by the court for the purpose of making the conveyance. It appears that since the decree was entered the case has been sent to a Master for the purpose of stating an account between the parties and ascertaining the balance due by appellee to appellant. The sum to be paid by appellee to entitle him to a conveyance of the land will thus be ascertained and the decree can then be carried into effect by the court below.¹

CULLEN v. CAREY.

SUPREME COURT, MASSACHUSETTS, 1888.

[146 Mass. 50.]

BILL IN EQUITY to compel the reconveyance of land on the ground that the transaction by which the defendant's testator gained title was in substance a mortgage. Writ dated December 24, 1885.

In the Superior Court the case was referred to a master, who found the following facts:

In 1869 the plaintiff bought the land in question, subject to a mortgage, and proceeded to erect a tenement house. Leonard Carey, the husband of the defendant, who was a carpenter and indebted to the plaintiff for money lent, built the house for the plaintiff, supplying nearly all the materials and labor under an oral agreement whereby his indebtedness to the plaintiff was to be applied in payment of the

¹ Compare: *Lincoln v. Wright*, 4 De G. & J. 16; *Moseley v. Moseley*, 86 Ala. 389; *Ward v. Matthews*, 73 Cal. 13; *Barnes v. Brohan*, 41 Conn. 278; *Cameron v. Ward*, 8 Ga. 245; *Cope v. Dapray*, 176 Ill. 478; *Tenny v. Simpson*, 37 Kans. 353; *Stinchfield v. Milliken*, 71 Me. 567; *Fiske v. Stewart*, 24 Minn. 97; *Keller v. Krunkel*, 46 Md. 565; *McDonough v. O'Neil*, 113 Mass. 92; *Robinson v. Latour*, 59 Miss. 148; *Page v. Page*, 8 N. H. 187; *Howell v. Howell*, 15 N. J. Eq. 75; *Carr v. Carr*, 52 N. Y. 251; *Nesbitt v. Cavender*, 27 S. C. 1; *Robinson v. Bank*, 85 Tenn. 363; *Swift v. Co.*, 71 Wis. 476. — ED.

cost of construction. When the house was completed, the balance due Carey, after paying his debt to the plaintiff, was \$1,106, and the value of the house and land above the existing mortgage was \$3,300. The plaintiff moved into the house and occupied it about six months.

On or about June 1, 1870, the plaintiff and Carey made an oral agreement that Carey should gain title to the premises by levy on execution, and by a sale under the power in the mortgage, and hold them as security for the plaintiff's debt to him, and, after payment of the debt and expenses out of the rents, should reconvey to the plaintiff. In pursuance of this agreement, the plaintiff, on June 1st, 1870, gave to Carey a note for \$4,000, upon which an action was brought and judgment obtained by default against the plaintiff as agreed. An execution was issued and levied by a sale to Carey of the plaintiff's equity of redemption in the premises for \$4,317.39, and a conveyance in due form was made to him on May 29, 1871. On July 6, 1871, Carey, by the payment of \$583.17, procured the assignment of the mortgage to a third person, who proceeded in due form to sell the premises under the power therein to Carey for \$950, and a deed was given to him and duly recorded.

MORRIS, C. J. It was held in *Campbell v. Dearborn*, 109 Mass. 130, that, although a deed be given which is absolute in form, yet the grantor may prove by parol testimony that it was understood and agreed by both parties to be given as security for a debt; and that upon such proof a court of equity will treat the deed as a mortgage. This is decisive of the case at bar.

For some reason, which does not appear to be fraudulent, the plaintiff did not directly convey the estate in question to the defendant's testator; he permitted the latter to obtain a judgment upon a debt in part fictitious, and thus to get a title by a levy upon the execution, and also to foreclose by a sale under an existing mortgage. But the substance of the transaction was the same as if a deed had been directly given by the plaintiff. Both parties agreed that the title thus obtained was to be held solely as security for the debt of the plaintiff to the defendant's testator, and a court of equity will treat the transaction according to its real nature as a mortgage.

The defendant does not stand in the position of an innocent purchaser, as she contends. She took as a general devisee under the will of her husband, and besides is shown to have had notice of the nature of the transaction.

*Decree affirmed.*¹

¹ Compare: *Cransdown v. Johnson*, 3 Ves. 170; *Howland v. Blake*, 97 U. S. 624; *Downing v. Iron Co.*, 93 Ala. 262; *McNeil v. Gates*, 41 Ark. 264; *O'Connor v. Irvin*, 74 Cal. 435; *Klock v. Walter*, 70 Ill. 416; *Cox v. Ratcliffe*, 105 Ind. 374; *Judd v. Moseley*, 30 Ia. 423; *Martin v. Martin*, 16 B. Mon. 8; *Hassam v. Barrett*, 115 Mass. 256; *Anderson v. Smith*, 103 Mich. 446; *Libby v. Clark*, 88 Me. 32; *Sloggin v. Heard*, 31 Miss. 426; *O'Fallon v. Clopton*, 89 Mo. 284; *Merritt v. Brown*, 19 N. J. Eq. 286; *Wheeler v. Reynolds*, 66 N. Y. 627; *Coble v. Branson*, 98 N. C. 160; *Kellener v. Smith*, 33 Pa. 158; *Harrison v. Bailey*, 14 S. C. 334. — ED.

GILES v. PERKINS.

KING'S BENCH, 1807.

[9 East, 12.]

DICKENSON and Co. were bankers at Birmingham, with whom the plaintiffs had opened a banking account in 1804, which was continued down to the 18th of November, 1805, when Dickenson and Co. stopped payment and became bankrupts. On the 12th of November, 1805, the plaintiffs paid into the bank three bills to the amount of above £1,100, which were indorsed by them, but were not due till December and January following; and at the time of the bankruptcy there was a considerable balance due to the plaintiffs upon their cash and bills (due) account, independent of the three bills in question. It was stated to be the practice of this and other banking houses in the country, that when bills which were approved were brought to them by a customer, though the bills were not then due, if they had not a long time to run, they would enter them in a gross sum with cash, or paper which was immediately payable, to the credit of the customer; giving him either cash or liberty to draw upon them to that amount.

And the question was, whether they were entitled to receive back these bills in specie from the bankrupts at the time of their bankruptcy, the same not being then due, though indorsed by them, and the balance of the cash account being in favor of the plaintiffs; or whether they were only entitled to come in as creditors under the commission for the whole amount of their banking account. LORD ELLENBOROUGH, C. J., was of opinion, at the trial before him at Guildhall, that the plaintiffs were entitled to recover; and they accordingly obtained a verdict for the amount of the bills.

LORD ELLENBOROUGH, C. J. Every man who pays bills not then due into the hands of his banker places them there, as in the hands of his agent, to obtain payment of them when due. If the banker discount the bill or advance money upon the credit of it, that alters the case; he then acquires the entire property in it, or has a lien on it *pro tanto* for his advance. The only difference between the practice stated of London and country bankers in this respect is, that the former, if overdrawn, has a lien on the bill deposited with him, though not indorsed; whereas the country banker, who always takes the bill indorsed, has not only a lien upon it, if his account be overdrawn, but has also his legal remedy upon the bill by the indorsement; but neither of them can have any lien on such bills until their account be overdrawn: and here the balance of the cash account at the time of the bankruptcy was in favor of the plaintiffs.

PER CURIAM,

*Rule refused.*¹

¹ Compare: *Zinck v. Walker*, 2 Blacks. 1154; *Ex parte Madison*, 1 Rose, 241; *Ex parte Wakefield Bank*, 1 Rose, 243; *Ex parte Bond*, 1 M. D. & D. 10; *Ex parte Thompson, Mont. & M.* 102; *Gaden v. Bank*, 1899 S. C. 281; *Richmond v. Bank*, 94 Fed.

CARSTAIRS AND OTHERS, ASSIGNEES OF KENSINGTON AND
CO., BANKRUPTS, v. BATES.

NISI PRIUS, 1812.

[3 *Campbell*, 301.]

THIS was an action against the defendant, as acceptor of a bill of exchange for £230, dated 13th July, 1812, drawn by J. Allport, payable to his own order, at two months after date, and indorsed by him to the bankrupts.

Allport the drawer kept cash with Kensington and Co. the bankers. On the 17th of July they discounted for him this bill and two others, — one for £50 and another for £80. They credited him with the amount of the three bills, and debited him with the discount; so that, deducting the discount, they were placed to his account as cash, which he might immediately have drawn out. There was then a balance due to him of three or four hundred pounds, and his account remained good till the banking-house stopped payment. This happened on the 21st of July, and the commission of bankrupt was sued out the following day.

LORD ELLENBOROUGH. Is it meant seriously to contest the right of the assignees to recover in this action? The bankers were the purchasers of this bill. They did not receive it as the agents of Allport. The whole property and interest in the bill vested in themselves, and they stood all risks from the moment of the discount. If the bill had been afterwards stolen or burnt, theirs would have been the loss. In *Giles v. Perkins* the bankers were mere depositaries, with a lien when the account was overdrawn. The customer there drew upon the credit of the bills deposited. Here Allport might have drawn out the amount of the bill, deducting the discount, as actual cash, in the same manner as if he had discounted the bill with a third person, and then paid in the amount in bank-notes. The discount makes the bankers complete purchasers of the bill; the transaction was completed; they had no lien, but the thing itself; the bill was as much theirs as any chattel they possessed. This very distinction was taken in the case cited; for it was there said, "If the banker discount the bill, or advance money upon the credit of it, that alters the case; he then acquires the entire property in it, or has a lien on it *pro tanto* for his advance."

*Verdict for the plaintiff.*¹

450; *St. Louis Co. v. Johnson*, 133 U. S. 566; *Sherrod v. Bank*, 103 Mich. 109; *South Co. v. Chicago Co.*, 75 Minn. 186; *Scott v. Ocean Bank*, 23 N. Y. 289; *Ayres v. Bank*, 79 Mo. 421; *Hutchinson v. Manhattan Co.*, 150 N. Y. 250; *Hoffman v. Bank*, 35 N. J. 604; *Williams v. Cox*, 97 Tenn. 555. — AMES: CASES ON TRUSTS, 11 n.

¹ Compare: *Ex parte Broad*, 13 Q. B. D. 740; *Re Hallett's Estate*, 13 Ch. D. 723; *Phoenix Bank v. Risley*, 111 U. S. 125; *Re Madison Bank*, 5 Biss. 515; *Bank v. Miller*, 77 Ala. 168; *Bank v. Chandler*, 27 Ill. 525; *Kansas Bank v. First Bank*, 62 Kans. 788; *Billingham v. Pollock*, 69 Miss. 759; *People v. Bank*, 78 N. Y. 269; *Bank v. Davis*, 114 N. C. 343; *Watson v. Coburn*, 35 Neb. 530; *Piano Co. v. Hult*, 14 S. Dak. 512; *Aiken v. Janes*, 93 Tenn. 353. — AMES: CASES ON TRUSTS, 12 n.

MUNN v. M'DONALD.

SUPREME COURT OF PENNSYLVANIA, 1840.

[10 Watts, 270.]

THIS was a writ of error to the District Court of Allegheny County, to remove the record of an action of assumpsit, brought by Alexander M'Donald, to the use of Allen Kramer, against David Munn.

The plaintiff declared as indorsee of a promissory note made by the defendant, dated the 2d day of May, 1836, at eleven months, for 300 dollars, without defalcation for value received, payable to the order of Thomas J. Gass, and by him indorsed to the plaintiff. The defendant pleaded payment, with leave, &c.

It appeared by the evidence of M'Donald, that the above note with the further indorsements of Samuel C. Gass and James H. Neel, was given to M'Donald on the 1st of September 1836, as collateral security for the payment of a note made by Thomas J. Gass, dated the 1st of September, 1836, at seven months, for 300 dollars, without defalcation for value received, payable to Alexander M'Donald or order: — the following receipt was taken at the time: —

“ 1st September 1836. Received of Thomas J. Gass a note drawn by David Munn, and indorsed by Thomas J. Gass, Samuel C. Gass, and James H. Neel, for 300 dollars, dated the 2d of May 1836, as collateral security for the payment of a note which he has this day given me for the same amount.

“ ALEXANDER M'DONALD.”

The defendant alleged, that Munn's note, on which the suit was brought, was given to Thomas J. Gass, in part payment for certain land which Gass had, by certain articles of agreement which were produced on trial, agreed to sell to Munn, and for which he was to make him a good and sufficient title, as soon as the purchase-money was paid; that Gass had forfeited his title to the lands before the date of the agreement. The defendant set up as an equitable defence to the plaintiff's recovery on the note, this failure of consideration in the transaction between Munn and Gass.

On the part of the plaintiff, the testimony of Alexander M'Donald went to show, that he had received the note in question from Gass, in exchange for goods and money — that the goods and money were advanced by him on the sole security of the note, and that at the time he took the note, he knew of no set-off or objections of any kind.

SERGEANT, J. The use of the term collateral security, when a debtor transfers to his creditor an article of value, or an evidence of debt, is intended to express, that it is not received in payment of the principal debt, and that it is not an additional right, to which the creditor is absolutely entitled. It is merely a concurrent security for

another debt, whether antecedent or newly created, and is designed to increase the means of the creditor to realize the principal debt which it is given to secure. It is subsidiary to the principal debt — running parallel with it — collateral to it — and when collected, is to go to the credit of the principal debt; or if the principal debt be paid off, the debtor is entitled to a restoration of the collateral security. But though a thing be given as collateral security, the rights of the creditor in it, as against third persons, must depend on other considerations, and may vary with the circumstances of each particular case. If one delivers to his creditor, as collateral security, a negotiable note, already indorsed by several indorsers, there can be no other meaning in such a transaction, than that the creditors shall enjoy all the remedies on the note, which the law gives him as holder, and the state of the parties to that note, is in nowise changed by its being taken as collateral security. Such holder may recover from the last indorser, as well as the others, and such last indorser, in that case, may recover against a prior indorser, or the maker, free in either case from any defence on the ground of want or failure of consideration between the maker and the payee. Now that was the case before us. The plaintiff received the note as collateral security for Gass's note, *bona fide* and for a valuable consideration, paid or advanced at the time. He received it as indorsee, with two indorsements upon it, besides that of the payee; and it is even proved, that he looked mainly to the security of one of these indorsers, and that it was at his instance the suit was instituted against the maker. The jury would be warranted in inferring from the evidence, that Gass procured the indorsements for the purpose of delivering them to the plaintiffs, for the receipt of the plaintiff specially mentions the indorsements, as upon the note at the time he received it. The plaintiff must be considered as receiving the note, not as the immediate indorsee of Gass, but of the last indorser, and Gass as the agent to hand it over to the plaintiff. To allow the defendant to interpose the defence he sets up, would deprive the plaintiff of the security contemplated by him when he agreed to accept the note, with the indorsements then existing upon it. Although, therefore, the note was given and received expressly as collateral security, yet the plaintiff stands in the position of a holder for value, and without notice of an instrument of such a nature, that we are of opinion, he is entitled to recover against the maker, free from any equity between the original parties.

The parol evidence does not go to contradict the terms of the receipt, but to show the circumstances under which it was given, and that the defendant was liable, notwithstanding the note was transferred as collateral security.

*Judgment affirmed.*¹

¹ Compare: *In re Athill*, 16 Ch. D. 223; *R. R. v. Bank*, 102 U. S. 14; *Winship v. Bank*, 42 Ark. 22; *Cockrane v. Sullivan*, 38 Ga. 292; *Best v. Crall*, 23 Kans. 484; *Morris v. Preston*, 93 Ill. 215; *Bank v. Chapin*, 8 Met. 40; *Logan v. Smith*, 62 Mo. 445; *City Bank v. Perkins*, 29 N. Y. 554; *Tucker v. Bank*, 58 N. H. 83; *Roseborough v. Messick*, 6 Ohio St. 448; *Miller v. Pollock*, 99 Pa. St. 202; *Bank v. Turnley*, 61 Tex. 365; *Bowman v. Van Kuren*, 29 Wis. 209. — Ed.

WILLIAMS, EXECUTRIX, &C. v. SMITH AND OTHERS.

SUPREME COURT OF NEW YORK, 1842.

[2 *Hill*, 301.]

ASSUMPSIT, tried at the Albany Circuit in April, 1841, before CUSHMAN, C. Judge. The action was against the defendants as makers and indorsers of a promissory note of \$4,000, made by Smith, Green & Co., payable to the order of Daniel K. Green, and indorsed by the latter and A. Preston. The note was created for the purpose of taking up another note, of the same amount, running at the Oneida Bank. Both notes were against the same parties, except Preston, whose name was not upon the elder note; and who indorsed the note sued upon for the accommodation of the other parties, with the understanding that if it was not used to take up the other note, it should be destroyed. It was delivered to Norton, one of the makers, to hand to the Oneida Bank, but he let one Keeler have it to raise money upon; and Keeler assigned it, with various other choses in action and possession, to the plaintiff's testator, as security to him against indorsements to be by him made for Keeler, not exceeding \$10,000. The indorsements were made; and there had been obtained out of the other property assigned to the testator, an indemnity for all his liabilities, except about \$2,400. It not appearing that the testator had notice of the purpose for which the note was intended, the circuit judge allowed the plaintiff to recover against all the defendants, Preston included, for the whole amount of the note. A new trial was now moved for on a bill of exceptions.

PER CURIAM. The case is within the principle which applies to an advance upon a purchase; and the testator having had no notice, Preston, though a mere accommodation indorser, could not defend on the ground of the misapplication of the note.

But inasmuch as the testator took the note as collateral security, the plaintiff could recover no more than the \$2,400, the amount remaining due on the principal demand; and on this ground there must be a new trial.

*New trial granted.*¹

HUBBELL v. DREXEL.

CIRCUIT COURT OF THE UNITED STATES, 1882.

[21 *Am. L. Reg. N. S.* 452.]

IN EQUITY.

Bill in equity filed in December, 1880, by W. W. Hubbell against Drexel & Co., to compel the transfer to the plaintiff of 1,702 shares of Pennsylvania Railroad stock.

¹ Compare: *Brown v. Callaway*, 41 Ark. 414; *Bell v. Bean*, 75 Cal. 86; *Hatchen v. Bank*, 79 Ga. 547; *Wells v. Chapman*, 81 Ill. 137; *Stolts v. Byers*, 17 Ia. 303; *Maitland v. Bank*, 40 Md. 540; *Fisher v. Fisher*, 98 Mass. 303; *Humphrey v. Vertner*, Freem. Ch. 251; *Grant v. Kidwell*, 30 Mo. 455; *Allaire v. Hartshorne*, 1 Zab. 665; *Atkinson v. Brooks*, 26 Vt. 569. — AMES: CASES ON BILLS AND NOTES, 642 n.

BUTLER, J. The allegation that the defendants procured a transfer of part of the stock to themselves, on the books of the company, immediately on receiving the certificates from him, is immaterial. It was plainly their right to do so. If he desired to avoid this he should have contracted accordingly. When thus transferred, it was unnecessary and impossible to distinguish between these shares and others held by the defendants. It is of no consequence, therefore, that in selling stock they may have disposed of these particular shares. They at all times had in hand an amount greatly in excess of the shares received from the plaintiff, and were therefore constantly prepared to keep their contract with him. A share of stock is without "ear-marks," and cannot therefore be distinguished, as has just been said, from others of the same corporation and issue. The certificates, bearing dates and numbers, are but evidence of title. On payment of his debt the plaintiff would have been entitled to a return of the number of shares which the defendants had received — nothing more. Such was the effect of the contract: *Nourse v. Prime*, 4 Johns. Ch. Rep. 490; *Allen v. Dykers*, 3 Hill, 593; *Gilpin v. Howell*, 5 Barr, 41.

For these reasons the bill must be dismissed, with costs.¹

NATIONAL EXCHANGE BANK v. WILDER.

SUPREME COURT OF MINNESOTA, 1885.

[34 Minn. 149.]

MITCHELL, J. The Minnesota Elevator Company, a corporation, owned and operated several warehouses, receiving grain from other parties for storage therein, and also buying wheat and storing it therein on its own account. At different times, from September 15, 1883, to May 1, 1884, the company obtained loans of money from certain banks, (the appellants,) and, having a large quantity of wheat of its own in store in its different warehouses, in order to secure the loans by way of pledge, it executed and delivered to the banks warehouse receipts for the same, designating therein (except, perhaps, in a single instance) the warehouses where such wheat was stored. These receipts ran directly to the banks or to the company's secretary and treasurer, who, serving as a mere conduit, transferred them to the banks by indorsement.

¹ Compare: *Phené v. Gillan*, 5 Hare, 1; *Langton v. Warte*, 4 Ch. App. 402; *Ex parte Gregory*, 2 M. D. & De G. 613; *Thompson v. Tolland*, 48 Cal. 100; *Price v. Grover*, 40 Md. 502; *Wood v. Hayes*, 81 Mass. 375; *Berlin v. Eddy*, 33 Mo. 426; *Nourse v. Prime*, 4 Johns. Ch. 590; *Markham v. Jandon*, 41 N. Y. 235; *Boylard v. Huquet*, 8 Nev. 345; *Gilpin v. Howell*, 5 Pa. St. 41; *Noyes v. Spaulding*, 27 Vt. 421. — Ed.

² This case is abridged. — Ed.

The rule is as universal as it is elementary that possession by the pledgee is necessary to the existence and continuance of a pledge. But this need not be actual physical possession. The delivery of a recognized symbol of title, such as a bill of lading or a warehouse receipt, which serves to put the pledgee in the control and constructive possession of the property, is sufficient. *Jones on Pledges*, § 37. Where property is in store with a warehouse man, the delivery of the warehouse receipt to the pledgee carries with it the constructive possession, and from the time of the transfer the warehouseman becomes the bailee of the pledgee. In accordance with this theory, and in harmony with the usages of trade, the tendency of the later authorities (although the proposition has been sometimes doubted or denied) is to hold that the owner of goods, if a warehouseman, can pledge the same by issuing and delivering his own warehouse receipt to the pledgee. *Colebrooke on Collateral Securities*, § 420; *Easton v. Hodges*, 18 Fed. Rep. 677; *Merchants', &c., Bank v. Hibbard*, 48 Mich. 118. The power of a warehouseman to make a delivery in this way, in case of a sale, is well settled. *Gibson v. Stevens*, 8 How. 384; *Broadwell v. Howard*, 77 Ill. 305. And we are unable to see any good reason founded on principle for any distinction in this regard between a sale and a pledge. If any distinction is made, it must be a purely technical one, without practical value, and which would never commend itself to business men. Such distinctions should be rejected by courts. There is no good reason in the nature of things why a delivery which is sufficient in case of a sale should not be so in case of a pledge. When the pledgor or the vendor is a warehouseman, the public has notice from that fact that the title and legal possession of property in his warehouse may be in others, although the actual physical possession is in himself. And where the property is a part of a larger mass of the same kind and quality, as wheat in an elevator, separation or segregation from the uniform mass is not necessary to constitute an appropriation of the property to the contract. The vendee or pledgee becomes tenant in common with the other owners. *Forbes v. Boston & Lowell Railroad*, 133 Mass. 154.

The result of what has been said is that the plaintiffs are entitled to the proceeds of the wheat in controversy, and to an order to the assignee of the elevator company to pay them over in accordance with the prayer of their petition. There is no occasion to remand the cause to the District Court. The order appealed from is reversed, and an order or judgment is hereby directed to be entered in this court in accordance with the prayer of the petitioners, directing the assignee to pay over to plaintiffs the sum of \$9,029.69.¹

¹ Compare: *Tockey v. Smith*, 181 Ill. 564; *Morning Star v. Cunningham*, 110 Ind. 328; *Arthur v. R. R.*, 61 Ia. 648; *Bank v. Bryant*, 49 La. Ann. 467; *Cushing v. Breed*, 14 Allen, 376; *Ledyard v. Hubbard*, 48 Mich. 421; *Stone v. Quarl*, 36 Minn. 46; *Drug Co. v. Teasdale*, 52 Neb. 698; *Seymour v. Wyckoff*, 10 N. Y. 213; *Odell v. Lyda*, 46 Ohio St. 244; *Bank v. Hasselton*, 15 Lea, 216. — ED.

SECTION II. — ABSOLUTE RESERVATION.

BUBB'S CASE.

CHANCERY, 1678.

[Freeman, Ch. 38.]

BUBB did contract with A. for a parcel of land for £5,000, and paid him £140 in part, but before the rest of the money was paid, or any conveyance executed, A. dies, and makes B. his executor, C. being his heir.

B. prefers a bill against Bubb and C. to have the rest of the purchase money; who answered that they did not intend to proceed with the bargain, and Bubb said he was willing to lose his £140 that he had paid.

In this case it was agreed, that Bubb, who was the purchaser, might have referred his bill against the heir, to have had an execution of a conveyance pursuant to the agreement, by reason the agreement was executed in part in the testator's lifetime, by the payment of £140.

But it was insisted by the counsel of Bubb, that by reason he (being the purchaser) did not desire an execution of the agreement, and being content to lose what money he had paid, that the executor should not compel them to it.

But the court ruled that the executor should have the money, and that Bubb might when he pleased compel the heir to execute a conveyance of the estate.

Note. That the court took this to be a juggle betwixt Bubb and the heir, supposing that the heir had agreed to pay back the money to Bubb, and so to have kept the land, which was worth much more; for now the heir was to convey the land, but to have nothing for it, for the executor was to have the money.¹

GARSON v. GREEN.

CHANCERY, NEW YORK, 1814.

[1 Johns, Ch. 308.]

THE bill stated that the plaintiff sold to James Green, now deceased, in his lifetime, intestate, the one undivided third part of a house and lot

¹ Compare: *Baden v. Pembroke*, 2 Vern. 213; *Smith v. Hubbard*, 2 Dick. 730; *Re Manchester Co.*, 19 Beav. 365; *Fuller v. Bradley*, 160 Ill. 51; *Hall v. Jones*, 21 Md. 439; *Newton v. Swazey*, 8 N. H. 9; *Keep v. Miller*, 42 N. J. Eq. 100; *Williams v. Haddock*, 145 N. Y. 144; *Bender v. Wickenback*, 162 Pa. 18; *Stephenson v. Yandle*, 3 Hayw. 109; *Kelley v. Kelley*, 15 Lea. 194. — AMES: CASES ON EQUITY, 194 n.

of ground, of which the intestate was seised of two undivided third parts, in fee; and for which he was to pay the plaintiff 700 dollars, 200 dollars in cash, and the residue in 55 days, for which he was to give his promissory note; that, on the 2d of December, 1807, the plaintiff executed and delivered a deed to the intestate, for the plaintiff's undivided third of the premises, and the intestate paid him the 200 dollars, and gave him a promissory note, dated the 12th of December, 1807, for 500 dollars, payable in 55 days after date. Before the note became due the intestate died, leaving Margaret Green defendant, his widow, who took out letters of administration on his estate, and the other defendants, his heirs at law.

THE CHANCELLOR [KENT]. It is very evident from the proof, that the note was given in part payment of the consideration for the sale, by the plaintiff, of his undivided third part of the house and lot mentioned in the pleadings; and there is no evidence that the vendor did mean to trust to the estate sold, as a pledge for his money. It is a well-settled rule, (6 Ves. 483, 759, 760. 1 Schoale & Lefroy, 132. 1 Bro. 420. Sugden, ch. 12, p. 352,) that the vendor has a lien on the estate for the purchase money while the estate is in the hands of the vendee, and when there is no contract that the lien, by implication, was not intended to be reserved. Prima facie the purchase money is a lien on the land, and it lies on the purchaser to show that the vendor agreed to rest on other security. The death of the vendee does not alter the claim, for, as Lord Redesdale observed, in a like case, (Hughes v. Kearney, 1 Schoale & Lefroy, 132,) "the heir cannot be permitted to hold what his ancestor unconscientiously obtained; and is not a thing unconscientiously obtained when the consideration is not paid?" Taking a note for the purchase money does not affect the vendor's lien, and if part be paid, the lien is good as to the residue, and the vendee becomes a trustee as to that which is unpaid. Blackburn v. Gregson, 1 Bro. 420. The failure of the personal estate is sufficiently shown in the first instance; and there is nothing to gainsay it, and I shall, accordingly, decree a sale of the one third of the house and lot, towards satisfaction of the note.¹

Decree accordingly.

¹ Compare: Chapman v. Turner, 1 Vern. 267; Mackerth v. Symmons, 15 Ves. 329; Wilkinson v. May, 69 Ala. 33; Chapman v. Legget, 41 Ark. 292; Gallagher v. Mars, 50 Cal. 23; Wilson v. Lyon, 51 Ill. 166; Ahrend v. Odiorne, 118 Mass. 261; Dunton, v. Outhouse, 64 Mich. 419; Huxter v. Greene, 48 Pa. St. 96; Kent v. Gerhard, 12 R. I. 91; Willard v. Rees, 26 Wis. 540. — Ed.

PAINE v. MELLER.

CHANCERY, 1801.

[6 Ves. 349.¹]

UPON the first of September, 1796, the plaintiffs sold to the defendant by auction some houses in Ratcliffe Highway, upon the usual terms, a deposit of £25 per cent and a proper conveyance to be executed upon payment of the remainder of the purchase money at Michaelmas next. Before the conveyance was perfected the houses were burnt. The bill was then filed praying specific performance.

THE LORD CHANCELLOR [ELDON]. First, it is said, the title was never accepted in fact; 2dly, if not, under these circumstances a court of equity will not compel a specific performance. As to the second point the objection is grounded upon two circumstances: 1st, the simple fact of the fire; 2dly, that the premises had been insured prior to the contract; that that fact and the fact, that the insurance expired at Michaelmas, 1796, were not disclosed; and that the premises afterwards remained uncovered by any insurance. The authority of Sir Joseph Jekyll has been mentioned: but no case has been cited in support of that dictum; and it is in a degree suggested, not admitted at the bar, that it may be considered over-ruled by subsequent cases. As to the mere effect of the accident itself no solid objection can be founded upon that simply; for if the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, chargeable as his, capable of being encumbered as his, they may be devised as his; they may be assets; and they would descend to his heir. If a man had signed a contract for a house upon that land, which is now appropriated to the London Docks, and that house was burnt, it would be impossible to say to the purchaser, willing to take the land without the house, because much more valuable on account of this project, that he should not have it. As to the annuity cases and all the others, the true answer has been given; that the party has the thing he bought; though no payment may have been made; for he bought subject to contingency. If it is a real estate, he of course has it.

Then as to the non-communication, I cannot say, that in my judgment forms an objection: for I do not see how I can allow it, unless I say, this court warrants to every buyer of a house, that the house is insured, and not only insured, but to the full extent of the value. The house is bought, not the benefit of any existing policy. However general the practice of insuring from fire is, it is not universal; and it is yet less general that houses are insured to their full value, or near it. The question, whether insured or not, is with the vendor solely, not with the vendee; unless he proposes something upon that; and makes

¹ This case is abridged. — Ed.

it matter of contract with the vendor, that the vendee shall buy according to that fact, that the house is insured. I am therefore of opinion, that if the agent on behalf of this purchaser did accept this title previously to the destruction of the premises, the vendors are in the situation, in which they would have been, if the title and the conveyance were ready at Michaelmas, 1796, but by the default of the vendee were not executed, but the title was accepted, and the premises were burnt down on the quarter day.¹

OSBORN v. SOUTH SHORE CO.

SUPREME COURT, WISCONSIN, 1895.

[91 Wis. 526.]

APPEAL from a judgment of the Circuit Court for Bayfield County: JOHN K. PARISH, Circuit Judge. *Affirmed.*

Plaintiff sold to defendant a quantity of saw logs, to be paid for at the rate of \$6.10 per thousand feet, according to the scale to be thereafter made on the mill deck. The logs were delivered in defendant's boom at defendant's mill, and taken charge of by it, and plaintiff did all that he was to do under the contract. The contract contained the following provisions:

"It is expressly understood and agreed by the parties hereto that the legal title to and right of possession of said logs, and the lumber to be manufactured therefrom, shall be and remain in the party of the first part as security for the unpaid purchase price, until the same shall have been fully paid, and that the party of the second part will at all times keep on hand a sufficient quantity of said logs or lumber, separately piled, to secure the balance owing the party of the first part, the party of the second part having the right to sell and dispose of said logs and lumber for which full payment shall have been made; and in case of default of the party of the second part in making any of the payments hereunder, or in case of failure on his part to perform any of the conditions hereof, the party of the first part shall have the right to take immediate possession of said logs or lumber, and sell and dispose of the same at public auction, upon giving ten days' notice, for the purpose of satisfying the balance due by virtue of this contract and all

¹ Compare: *Rawlins v. Burgess*, 2 V. & B. 232; *Revell v. Hussey*, 2 Ba. & B. 280; *Osborne v. Nicholson*, 13 Wall. 654; *Cutcliffe v. McAnally*, 88 All. 507; *Willes v. Nozercraft*, 22 Cal. 607; *Phinozy v. Guernsey*, 111 Ga. 346; *Sherman v. Lehr*, 57 Ill. 509; *Davidson v. Hawkeye Co.* 71 Ia. 532; *Gammon v. Blaisdell*, 45 Kans. 221; *Cottingham v. Ins. Co.* 90 Ky. 301; *Skinner v. Houghton*, 80 Ind. 308; *Thompson v. Gould*, 20 Pick. 134; *Coggeshall v. Bank*, 63 Ohio, 88; *Hallett v. Parkes*, 60 N. H. 598; *Notman v. Hickey*, 143 N. Y. 630; *Elliot v. Ashland Co.*, 117 Pa. 460; *Hugermin v. Courtney*, 21 S. C. 403. — AMES: CASES ON EQUITY, 228 n. and 236 n.

costs and expenses in taking, keeping, and disposing of said property, and retain the same out of the proceeds of said sale, returning the surplus proceeds of said sale to the party of the second part."

Some of the logs were lost after they were delivered into defendant's possession as before stated, by being broken out of the boom by the movements of a lumber boat. Proof of the whole amount of logs delivered, including those not scaled on the mill deck because lost, was permitted.

Defendant requested the court to charge the jury, in effect, that plaintiff was not entitled to recover for the lost logs, which was refused, and defendant excepted. The court then charged the jury in effect, that all logs delivered, including those lost, should be paid for, which was excepted to by the defendant.

There was a verdict in favor of the plaintiff, and from the judgment entered thereon the defendant appeals.

MARSHALL, J. The sole question presented is whether defendant is liable for the logs that were lost, in view of the fact that plaintiff retained the title solely as security, and that such logs were never scaled on the mill deck.

Where property is sold and delivered, and the vendor has fully performed all the conditions of the contract of sale on his part, and the intention of the parties at the time of the making of the contract, as in this case, clearly is that the vendor is to have no interest in the property after delivery, except as security for the unpaid purchase money; that, subject to the right to resort to said property as such security, the entire dominion and control over the same are turned over to and assumed by the vendee, as such, although, for the purpose of retaining effectually the security, the contract of sale provides that the title and right of possession shall remain in the vendor, as security, until the purchase price is fully paid, and though the amount of the property is yet to be ascertained by a measurement in order to determine the amount of the purchase money, — if any of such property is lost after such delivery, before measurement, such loss must fall upon the vendee, whether the loss accrues through his negligence or otherwise, and the amount of such lost property may be ascertained by competent evidence. The relation of the parties to each other in respect to the question here presented, in such a case, is the same as between a mortgagor and a mortgagee of personal property, though the form of the instrument be that of a conditional sale; and the authorities holding that in case of a conditional sale, strictly so called, the risk of loss is on the vendor till title actually vests in the vendee, have no application whatever to such a state of facts. The conditional vendee, having possession subject only to the vendor's reservation of title as security for the unpaid purchase money, is in a sense the owner; if he pays the purchase money, he becomes the absolute owner, without any new transaction or bill of sale; if the goods be wrongfully taken away from him by a third party, he may recover their full value

of the wrongdoer; and if the property is lost or stolen while in his possession, whether by or without fault on his part, he must nevertheless pay the full price agreed upon. *Tufts v. Griffin*, 107 N. C. 49; *Burnley v. Tufts*, 66 Miss. 49.

The ruling challenged on this appeal is substantially in accordance with the law as here stated, and it follows that the judgment of the circuit court must be affirmed.

*Judgment affirmed.*¹

MOSES BROTHERS v. JOHNSON.

SUPREME COURT, ALABAMA, 1889.

[88 Ala. 517.]

APPEAL from the City Court of Montgomery, in equity.

Heard before the Hon. THOS. M. ARRINGTON.

The bill in this case was filed on the 26th August, 1889, by Moses Brothers, suing as partners, against Berry Johnson; and prayed an injunction, to restrain the defendant from cutting timber on a tract of land which the complainants had sold to him, except for repairs, fences, and other necessary purposes. An injunction was granted on the filing of the bill; and after answer filed, the defendant submitted a motion to dissolve it, both for want of equity in the bill, and on the denials of the answer. The court sustained the motion, and dissolved the injunction; and its decree is here assigned as error.

STONE, C. J. The appellants, who were the complainants, sold one hundred and sixty acres of land to the defendant, at the agreed price of fourteen hundred and forty dollars — nine dollars per acre. Only five dollars of the purchase-money was paid. The balance, including interest, was agreed to be paid in annual installments, running through about five years from the date of the purchase, January 5, 1889. Complainants retained the title, giving to Johnson, the purchaser, their obligation to make him title on payment by him of the purchase-money, and accruing taxes. The agreement stipulated further, that if Johnson failed "to pay any of said installments when due," then Moses Brothers "have the right to annul this agreement, and take possession of the premises, and to retain out of the moneys paid under this agreement [by Johnson] sixty dollars per annum as rent of the premises, said amount being hereby agreed and declared by said parties to be the

¹ Compare: *Brown v. Hare*, 4 H. & N. 822; *Martineau v. Ritchen*, L. R. 7 L. B. 436; *Ingles v. Stock*, 10 App. Cas. 263; *Wise v. M'Mahon*, Longf. & J. 192; *Hessell-backer v. Ballantyne*, 28 Ont. 182; *Arthur v. Blackman*, 63 Fed. 536; *Bishop v. Nunderhout*, 128 Ala. 162; *Randall v. Stone*, 77 Ga. 501; *Burley v. Tufts*, 66 Miss. 48; *Tufts v. Wynne*, 45 Mo. App. 42; *Tufts v. Griffin*, 107 N. C. 47; *Topt v. White*, 12 Heisk. 165. — Ed.

² This case is abridged. — Ed.

annual rental value of the premises ; returning the surplus, if any, to" Johnson.

When a vendor of real estate enters into an executory agreement to convey title on the payment of the purchase-money, he sustains, in substance, the same relation to the vendee, as a mortgagee does to a mortgagor. Each has a legal title, which, in the absence of stipulations for possession, will maintain an action of ejectment. Each can retain his legal title against the other party, until the purchase-money, or mortgaged debt, is paid, unless he permits the other to remain in undisturbed possession for twenty years. And yet each is at last but a trustee of the legal title for the mortgagee or vendee, if the purchase-money, or mortgage debt, as the case may be, is paid, or seasonably tendered. The same mutual rights and remedies, legal and equitable, and the same limitation to the right of recovery, obtain in the one relation and in the other. *Relfe v. Relfe*, 34 Ala. 500; *Bizzell v. Nix*, 60 Ala. 281; *Chapman v. Lee*, 64 Ala. 483; *Sweeney v. Bixler*, 69 Ala. 539.

We have found but a single case precisely like the present one in its facts. In *Scott v. Wharton*, 2 Hen. & Munf. 25, a sale of land had been made on a credit, and title retained by the vendor. The vendee went into possession, and a bill was filed by the vendor, charging him with committing waste by cutting timber, and praying for an injunction. The court treated the case precisely as if it had been a bill by mortgagee against mortgagor, to restrain him from lessening the security by felling and removing the timber. *Fairbank v. Cudworth*, 33 Wis. 358.

We feel safe in holding, that a vendor who sells on credit, retaining the title as security for the purchase-money, sustains the same relation to the vendee, so far as the question of security is concerned, as does the mortgagee to the mortgagor.

In *Coker v. Whitlock*, 64 Ala. 180, this court ruled, that when the mortgagor is committing waste which impairs the security, or renders it insufficient, chancery, at the suit of the mortgagee, will restrain him by injunction. *Coleman v. Smith*, 55 Ala. 368; *Hammond v. Winchester*, 82 Ala. 470; *Sullivan v. Rabb*, 86 Ala. 433; also, 2 Dan. Ch. Prac. 1629, n. 3; *Usborne v. Usborne*, 1 Dickens, 75; *Brady v. Waldron*, 2 John. Ch. 148; *Robinson v. Preswick*, 3 Ed. Ch. 246; *Murdock's Case*, 2 Bland, 461; *Downing v. Palmeteer*, 1 Mon. 64.

However it may be made to appear by proof, the pleadings do not make a case for a dissolution of the injunction; and the decretal ordered dissolving the injunction must be reversed, and the injunction reinstated.¹

Reversed and rendered.

¹ Compare: *Crockford v. Alexander*, 15 Ves. 138; *Miller v. Waddington*, 91 Cal. 377; *Sewall v. Slocum*, 112 Ga. 279; *Baldwin v. Pool*, 74 Ill. 97; *McCaclin v. Stall*, 44 Ind. 151; *Jennison v. Stone*, 33 Mich. 99; *Scott v. Wharton*, 2 Hen. & M. 25.—AMES: CASES ON EQUITY, 222 n.

ACLAND *v.* GAISFORD.

CHANCERY, 1816.

[2 *Madd.* 28.]

THE Original Bill was filed 31st May, 1809, by T. P. Acland, praying, that David Cuming, the Defendant (since deceased), might specifically perform his Contract to sell to the Plaintiff the Fee Simple of an Estate, called Stone, and Stone Down at Exford, in Somersetshire; and that the Defendant might be decreed to allow the Plaintiff Interest on the Purchase Money, £2,900. The Purchase Agreement was dated 4th June, 1807, and the Purchase Money was agreed to be paid on or before the ensuing 25th March, if a tender of a proper Conveyance was made. The Estate was in the possession of one — Pitts, as Tenant to the Vendor, whose Tenancy expired at Lady-day, 1808.

THE VICE-CHANCELLOR. The Master having reported that a good Title can be made to this Estate, and that David Cuming, deceased, the Defendant to the original Bill, could make a good Title before the filing of the original Bill, Mr. Acland, the Plaintiff in that Suit, must pay the Costs of it, and so much of the Costs of the Supplemental Bill as relate to the original Suit; but I shall not give any Costs in the supplemental Suit. One question is, What Interest Acland is to pay on his Purchase Money? It has been contended that he should pay £5 per Cent. on his Purchase Money, because he, in a Letter stated in the original Bill, and admitted in the Answer to that Bill, applied to Cuming for his consent to lay out the Purchase Money in Exchequer Bills, to which Cuming returned no answer; but in fact, the Purchase Money was laid out in Exchequer Bills. This does not vary the general Rule. Cuming not having assented to the Purchase of the Exchequer Bills, Acland was alone subject to all the risk; and the Plaintiff in the Supplemental Bill cannot now claim the benefit of that Purchase; but Acland must pay his Purchase Money, with £4 per Cent. Interest. Another Question that has been made, is, Whether the Decree should not go farther than in ordinary cases, and direct, in favour of Acland, an Account of the Rents and Profits of the Estates, which were, or which, without his wilful default, might have been, received?

I have not found any authority which determines what is to be done with the Estate during the interval when the Title is under dispute; during the suspension of an Executory Contract. In Equity, an Estate agreed to be purchased is considered as the Estate of the Purchaser from the time of the Contract, and the Purchase Money from that time is held to belong to the Vendor; but with respect to Possession, there is no change in the notion of Equity, until the Purchase Money is paid. The Vendor has a clear right to keep Possession until the Purchase Money is paid; if the Purchaser enters before he has

paid his Purchase Money, he is a Trespasser. *Quoad* Possession, the Estate belongs to the Vendor — it is not the Estate of the Vendee for the purpose of Possession; for though in many cases the Purchaser is responsible, as if there be a Fire, still as to Possession, the right is in the Vendor, till his Purchase Money is paid.

What has been decided as to responsibility for the Purchase Money? If the Purchaser suffers the Money to lie dead, it is matter of indifference to the Vendor: Why? Because the Vendee having the Money, must take care to employ it. *Roberts v. Massey*, is an authority to show that the Vendor is entitled to his Purchase Money and Interest, though the Vendee has kept it at his Banker's unemployed. The Vendor, therefore, may call for Interest upon his Purchase Money, although the Vendee has suffered it to lie dead. Then, to pursue that principle, must not the Vendor, the legal Owner of the Estate, by a parity of reasoning, take care of the purchased Estate? He must. If he has received Rent, he must account for it; if he has suffered Tenants to run in arrear, he is responsible for the loss thereby occasioned. If Possession of the Estate was given, or any Tender of Possession was made to the Defendant, or the Defendant exercised acts of Ownership over the premises, that may make a difference. These Facts are not now before me. If the Parties wish, they must be inquired into.¹

CARPENTER v. SCOTT.

SUPREME COURT, RHODE ISLAND, 1881.

[13 R. I. 477.]

MATTESON, J. This is an action of replevin to recover possession of a rolling mill, attached by the defendant, a deputy sheriff. On the seventeenth day of November, 1879, the Willets Manufacturing Company delivered to John Anthony the mill in question under an agreement, purporting to be a lease, by which Anthony was to pay them for the mill five hundred dollars, in twenty monthly instalments of twenty-five dollars each, the first on the date named and the rest on the seventeenth day of each succeeding month, with interest at seven per cent per annum. If Anthony failed to make any payment within five days after the date specified for such payment, the Willets Manufacturing Company might terminate the contract and take immediate possession of the mill. At the expiration of the lease, Anthony, having complied with its conditions,

¹ Compare: *Burton v. Todd*, 1 Sw. 255; *Egmond v. Smith*, 6 Ch. D. 469; *Dunson v. Frazer*, 12 Sim. 263; *Clarke v. Ramitz*, 1891, 2 Q. B. 456; *Malone v. Henshaw*, L. R. 29 Ir. 352; *Loventahl v. Home Co.*, 112 Ala. 108; *Hemlin v. Martin*, 53 Cal. 321; *Holenberg v. Johnson*, 45 Kans. 197; *Lombard Co. v. Chicago Co.*, 75 Ill. 271; *Eastman v. Simpson*, 139 Mass. 348; *Craig v. Greenwood*, 24 Neb. 557; *Weakland v. Hoffman*, 50 Pa. 513; *Wowall v. Munn*, 38 N. Y. 137; *Hampton v. Snipp*, 1 Dess. 125. — AMES: CASES ON EQUITY, 221 n.

was to receive a bill of sale of the mill. At the date of the delivery of the mill to Anthony, he was a member of a partnership composed of Thomas Anthony, Thomas J. Linton, and himself. The business of the partnership was at that time, and until the eleventh day of March, 1880, continued to be, transacted in the name of John Anthony. The contract for the mill, though in his name, was for the benefit of the partnership, and the partnership funds were used for the first payment, and for the successive payments of the instalments as they became due. On the eleventh day of March, 1880, the partnership, under the name of John Anthony & Co., executed and delivered to the plaintiff a mortgage, signed by each of the partners, and purporting to convey, besides their other property, the mill in question, "subject to a certain claim of the Willets Manufacturing Company." In July following John Anthony withdrew from the partnership, and the business after that date was conducted under the name of Thomas Anthony & Co. On the twenty-second day of June, 1881, the last instalment of the rent, or price, of the mill was paid, and the Willets Manufacturing Company gave a receipted bill of sale of it to Thomas Anthony & Co. This bill of sale named John Anthony as the vendee, and acknowledged payment of the price by Thomas Anthony & Co., for John Anthony. On the same day the Willets Manufacturing Company brought suit against John Anthony for an indebtedness of his to them, and delivered the writ to the defendant for service, which was made in part by attaching the mill replevied in this suit.

The question raised by the foregoing facts is, whether the mortgage to the plaintiff, in so far as it purports to convey the rolling mill, is valid as against the attachment of the Willets Manufacturing Company. We think it is. Such a transaction as that above described, by which the mill in question passed into the possession of John Anthony, though in form a lease, is regarded in law as a conditional sale. *Goodell v. Fairbrother*, 12 R. I. 233; *Currier v. Knapp*, 117 Mass. 324; *Greer v. Church & Co.* 13 Bush (Ky.), 430, 433, 434. Under it the vendee acquires, not only the right of possession and use, but the right to become the absolute owner upon complying with the terms of the contract. These are rights of which no act of the vendor can divest him, and which, in the absence of any stipulation in the contract restraining him, he can transfer by sale, or mortgage. Upon performance of the condition of the sale, the title to the property vests in the vendee, or in the event that he has sold, or mortgaged it, in his vendee, or mortgagee, without further bill of sale. *Day v. Basset*, 102 Mass. 445, 447; *Crompton v. Pratt*, 105 Mass. 255, 258; *Currier v. Knapp*, 117 Mass. 324, 325, 326; *Chace v. Ingalls*, 122 Mass. 381, 383. It follows from these principles, that immediately on payment of the last instalment of the price, the title to the rolling mill vested in John Anthony, or in him and his copartners, it is immaterial which, and that, thereupon, the plaintiff's mortgage became valid, and entitled to priority over the attachment of the Willets Manufacturing Company subsequently made.

The defendant contends that the plaintiff's mortgage is invalid as against the attachment, because the plaintiff had never taken possession of the rolling mill under it. In support of this claim he cites *Williams v. Briggs*, 11 R. I. 476, and *Cook v. Corthell*, 11 R. I. 482. These cases are, however, widely different from the present. They do, indeed, hold that, at law, a mortgage of personal property to be subsequently acquired conveys no title, unless possession of the property when acquired is given to, or taken by, the mortgagee. They rest upon the familiar maxim, that no one can grant, or charge, that which he does not have. At the execution of the mortgages the mortgagors had no interest whatever in the property, the title to which was involved in these suits. It was property which was to come into their possession, and in which they were to acquire an interest, in the future, and which might not have been in existence, even, when the mortgages were made. In the present case, on the contrary, the mortgagors at the making of the mortgage had the possession of the property, with the right to its possession and use, and the right to become its absolute owners on complying with the conditions of the sale. These rights constituted an actual, present interest in the property, which, as we have seen above, is capable of transfer by sale or mortgage.

In accordance with the stipulation of the parties, judgment is rendered for the plaintiff for costs. *Judgment for plaintiff for costs.*¹

LIPPINCOTT v. SCOTT.

SUPREME COURT, PENNSYLVANIA, 1901.

[198 Pa. St. 283.]

REPLEVIN to recover a soda fountain.

PER CURIAM, January 7, 1901: The appellant asserts that the principal question for consideration in this case is whether the agreement for the transfer of the soda water fountain was a bailment or a conditional sale. The jury found by their verdict that it was a bailment. If the verdict was warranted by the evidence and no error was committed in the instructions to the jury, the verdict and the judgment thereon must prevail against the appellant's claim. The written agreement of the parties appears on its face as a bailment. It is clearly within *Rowe v. Sharp*, 51 Pa. 26, *Enlow v. Klein*, 79 Pa. 488, *Brown v. Billington*, 163 Pa. 76, and *Ditman v. Cottrell*, 125 Pa. 606. The effort of the appellant to make the agreement appear as a conditional

¹ Compare: *Harkness v. Russell*, 118 U. S. 663; *Leigh Bros. v. R. R.*, 58 Ala. 165; *Dowdy v. McClellan*, 52 Ga. 408; *Greer v. Church & Co.*, 13 Bush, 430; *Currier v. Knapp*, 117 Mass. 324; *Warner v. Bank*, 115 N. Y. 251; *Sage v. Sleutz*, 23 Ohio St. 1; *City Bank v. Tufts*, 63 Tex. 113; *Burnell v. Marvin*, 44 Vt. 277. — ED.

sale has no material or satisfactory evidence to support it. As to the instructions complained of it is sufficient to say that we have discovered no error, or anything of an unfair or partial nature in them.

*Judgment affirmed.*¹

STRAUSS SADDLERY CO. v. KINGMAN & CO.

COURT OF APPEALS, MISSOURI, 1890.

[42 Mo. App. 208.]

BIGGS, J. This is an action for goods sold and delivered, amounting, at the contract price, to the sum of five hundred dollars. The cause was submitted to the court without a jury, and the finding and judgment were for the defendant. The plaintiff appealed.

The plaintiff's evidence tended to prove that, for the year 1887, the plaintiff and defendant did business with each other under the following written agreement, to wit:

"Memorandum agreement made and entered into this second day of February, A.D. 1887, by and between Jacob Strauss Saddlery Company of St. Louis, Missouri, party of the first part, and Kingman & Co. of Peoria, Illinois, and of St. Louis, Missouri, party of the second part, witnesseth:

"*First.* That the party of the first part agrees to furnish the said party of the second part with harness of their manufacture at ten (10) per cent discount from list prices now in force, for the season of 1887, and agrees to carry with the said party of the second part, at Peoria, a stock amounting at net prices to not over five hundred (\$500) dollars.

"*Second.* The party of the second part is to make report of goods sold, on or about the first of each month, the net amount to be due and payable in ninety days from date of said report; or if cash is remitted by party of the second part three per cent discount will be allowed."

The plaintiff also introduced evidence tending to prove that, at the expiration of the agreement, it was renewed for the year 1888; that, during the year 1888, the plaintiff delivered to the defendant, in pursuance of this agreement, goods to the amount of thirty-four hundred and four dollars and eighty-four cents; that, on account of goods so sold, the defendant remitted only the sum of twenty-nine hundred and four dollars and eighty-four cents; that, at the close of the year 1888, there remained unaccounted for in the hands of the defendant a lot of harness

¹ Compare: Walker v. Hyman, 1 Ont. App. 345; The Calais S. B. Co., 1 Cliff. 370; Hodson v. Warner, 60 Ind. 214; Peabody v. McGuire, 19 Me. 586; Wiggins v. Snow, 89 Mich. 476; Manrule v. Norton, 46 N. J. L. 410; Barrett v. Prichard, 2 Pick. 512; Dows v. Dennistown, 28 Barb. 393; Richardson Co. v. Tadall, 52 Neb. 698; Rowe v. Sharp, 51 Pa. 26; Oester v. Setlington, 115 Mo. 247; Meeker v. Johnson, 3 Wash. 247. — Ed.

² This case is abridged. — Ed.

of the value of five hundred dollars, which the defendant refused to either pay for or return.

The defendant admitted the agreement, and it also admitted that, during the year 1888, it had received five hundred dollars' worth of goods under it, for which it had rendered no account. As an excuse for not returning or paying for the goods the defendant introduced evidence to the effect that, during the year 1888, the house in which it was doing business was destroyed by fire, and that, of the goods received under the contract, seven hundred and fifty-six dollars' worth was consumed; that the goods were stored in a reasonably safe place, and the fire did not occur through the defendant's neglect; that, after the fire, and prior to the institution of this suit, the defendant paid to the plaintiff one hundred and thirty-six dollars and sixty cents, which paid in full for all goods received in excess of five hundred dollars.

Upon this statement of the evidence the defendant, on the one hand, denied legal liability to pay for the goods upon two grounds: *First*. That the delivery was merely for the purposes of a sale to take effect upon the happening of a condition. *Second*. That the defendant held the goods for the plaintiff on consignment. On the other hand, the plaintiff urges that the transaction in reference to the goods was one of "sale or return," and, as the defendant neither returned nor paid for the goods at the end of the year, its right of action for goods sold and delivered became complete.

If the delivery of the goods under the agreement, when viewed in the light of the subsequent correspondence between the parties, amounted to what is called a contract of "sale or return," then the title vested immediately in the defendant, and the loss must fall on it. *Meldrum v. Snow*, 9 Pick. 441; *Hilliard on Sales* (3d ed.), p. 28, § 3; *Crocker v. Gullifer*, 44 Me. 491; *Buswell v. Bicknell*, 17 Me. 344; *Dearborn v. Turner*, 16 Me. 17; *Holbrook v. Armstrong*, 10 Me. 31; *Jameson v. Gregory*, 4 Met. (Ky.) 363; *Moss v. Sweet*, 3 Eng. L. & E. R. 311; *Hotchkiss v. Higgins*, 52 Conn. 205. Addison in his work on contracts thus defines such a sale: "When goods are sold under a contract of 'sale or return,' the sale is a conditional or defeasible sale. The right of property in the goods passes to the purchaser, subject to be divested out of him and revested in the vendor by a return of the goods to the latter, in accordance with the terms of the contract." *Addison on Contracts* (8th ed.), *991.

The application of legal rules to the agreement, as interpreted by the parties themselves, is somewhat troublesome. Our conclusion is that, when the contract expired, it was the duty of the defendant either to pay for or return, without demand, all goods received in excess of the value of five hundred dollars. If it failed to do this, it was liable to an action. As to such excess the dealings between the parties contemplated a contract of "sale or return." But we are of opinion that this rule ought not to be applied to the "stock of the value of five hundred dollars," which the plaintiff agreed to keep with the defendant. As to

this, other principles find application and must govern. It cannot be said that the defendant purchased the "stock" with the privilege of returning the same at the expiration of the contract, if unsold. Under the agreement the defendant only obtained the optional right to purchase it, in the event he found purchasers for the whole, or any part of it. The plaintiff was seeking a market for its goods, and, in order to induce the defendant to give its patronage, it was agreed that, of the goods furnished, five hundred dollars' worth was to be considered as stock furnished by the plaintiff. *Judgment affirmed.*¹

CHICAGO EQUIPMENT CO. v. MERCHANTS' BANK.

SUPREME COURT, UNITED STATES, 1889.

[136 U. S. 268.²]

THIS action was brought by the Merchants' National Bank of Chicago against the Chicago Railway Equipment Company, a corporation of Wisconsin, upon two written instruments, one of which is in the words and figures following:

"\$5,000.

CHICAGO, ILL., January 20, A.D. 1884.

"For value received, four months after date, the Chicago Railway Equipment Company promise to pay to the order of the Northwestern Manufacturing and Car Company of Stillwater, Minnesota, five thousand dollars at First National Bank of Chicago, Illinois, with interest thereon at the rate of — per cent per annum from date until paid.

"This note is one of a series of twenty-five notes, of even date herewith, of the sum of five thousand dollars each, and shall become due and payable to the holder on the failure of the maker to pay the principal and interest of any one of the notes of said series, and all of said notes are given for the purchase price of two hundred and fifty railway freight cars manufactured by the payee hereof and sold by said payee to the maker hereof, which cars are numbered from 13,000 to 13,249 inclusive, and marked on the side thereof with the words and letters Blue Line C. & E. I. R. R. Co.; and it is agreed by the maker hereof that the title of said cars shall remain in the said payee until all the notes of said series, both principal and interest, are fully paid, all of said notes being equally and ratably secured on said cars.

"No. 1.

GEO. B. BURROWS, *Vice-President.*"

"Countersigned by E. D. Buffington, Treasurer."

This writing is indorsed: "Northwestern Manufacturing and Car Co., per J. C. Gorman, Treas."

¹ Compare: *Head v. Tattershall*, L. R. 7 Ex. 7; *Collins v. Woodruff*, 9 Ark. 463; *Hotchkiss v. Higgins*, 52 Conn. 205; *Dearborn v. Turner*, 16 Me. 17; *Hunt v. Wyman*, 100 Mass. 198; *Young v. Leary*, 35 N. Y. 539; *Caldwell v. Frazier*, 68 Pac. 1076. — Ed.

² This case is abridged. — Ed.

The other instrument bears the same date, and is in all respects similar to the first one. No question is made as to the genuineness of the signatures to these instruments of the vice-president and treasurer of the defendant, nor as to the plaintiff having paid value for them before maturity. They were declared upon as negotiable promissory notes. In support of the defence certain evidence was offered that was excluded, and the jury pursuant to the direction of the court returned a verdict in favor of the plaintiff for the full amount of the two instruments. 25 Fed. Rep. 809.

MR. JUSTICE HARLAN, after stating the case in the opinion of the court as above reported, continued :

Are the writings in suit to be regarded as promissory notes to be protected, in the hands of *bona fide* holders for value, according to the rules of general mercantile law as applicable to negotiable instruments, or are they anything more than simple contracts subject, in the hands of transferees, to such equities and defences as would be available between the original parties ? This is the question upon which, it is conceded, depends the correctness of the several rulings to which the assignments of error refer.

Turning to the notes here in suit, we find every element of a sale and transmission of ownership, despite the provision that the title to the cars should remain in the payee, until all the notes of the series were fully paid. The notes, upon their face, show they were given for the "purchase price" of cars "sold" by the payee to the maker and they are "secured" equally and ratably on the cars, in order to prevent the holder of one of the notes from obtaining out of the common security a preference over holders of others of the same series. This provision placed the parties upon the same footing they would have occupied if a chattel mortgage, covering all the notes, had been executed by the purchaser of the cars. If the notes had been in the usual form of promissory notes, and the maker had given a mortgage back to the payee, the title would, technically, have been in the payee until they were paid. But they would, in such case, have been negotiable securities protected in the hands of *bona fide* holders for value against secret defences, and their immunity from such defences would have been communicated to the mortgage itself. In *Kenicott v. Supervisors*, 16 Wall. 452, 469, it was said that where a note secured by a mortgage is transferred to a *bona fide* holder for value before maturity, and a bill is filed to foreclose the mortgage, no other or further defences are allowed against the mortgage than would be allowed were the action brought in a court of law upon the note. To the same effect are *Carpenter v. Longan*, 16 Wall. 271, 274. See also *Swift v. Smith*, 102 U. S. 442, 444; *Collins v. Bradbury*, 64 Maine, 37; *Towne v. Rice*, 122 Mass. 67, 73.

The agreement that the title should remain in the payee until the notes were paid — it being expressly stated that they were given for the price of the cars sold by the payee to the maker, and were secured

equally and ratably on the property — is a short form of chattel mortgage. The transaction is, in legal effect, what it would have been if the maker, who purchased the cars, had given a mortgage back to the payee, securing the notes on the property until they were all fully paid. The agreement, by which the vendor retains the title and by which the notes are secured on the cars, is collateral to the notes, and does not affect their negotiability. It does not qualify the promise to pay at the time fixed, any more than would be done by an agreement, of the same kind, embodied in a separate instrument, in the form of a mortgage. So far as the notes upon their face show, the payee did not retain possession of the cars, but possession was delivered to the maker. The marks on the cars showed that they were to go into the possession of the maker, or of its transferee, to be used. The suggestion that the maker could not have been compelled to pay if the cars had been destroyed before the maturity of the notes, is without any foundation upon which to rest. The agreement cannot properly be so construed. The cars having been sold and delivered to the maker, the payee had no interest remaining in them except by way of security for the payment of the notes given for the price. The reservation of the title as security for such payment was not the reservation of anything in favor of the maker, but was for the benefit of the payee and all subsequent holders of the paper. The promise of the maker was unconditional.

*Judgment affirmed.*¹

OGG v. SHUTTER.

COURT OF APPEAL, 1875.

[1 C. P. D. 47.]

APPEAL from the decision of the Court of Common Pleas, discharging a rule to enter a verdict for the defendant.

The declaration was for conversion of 251 sacks of potatoes.

Pleas, not guilty, and that the goods were not the plaintiffs' as alleged. Issues thereon.

The facts were as follows. The plaintiffs had, in January, 1874, entered into a contract with Mons. Paresys Loutre, of Merville in France, for the purchase from him of potatoes. The contract was contained in several letters between the purchasers and the vendor. The terms ultimately agreed on were as follows, viz. for twenty tons of potatoes, at 84 fr. per 1000 kilogrammes, deliverable in the course of the current month, free on board of a ship at Dunkirk, payment to be by cash against bill of lading signed by the captain. It was also stipu-

¹ Compare: *So. Co. v. Paddock*, 37 Kans. 510; *Howard v. Simpkins*, 69 Ga. 774; *Swallow v. Emery*, 111 Mass. 355; *Deering v. Thorne*, 29 Minn. 120; *Choatt v. Stephens*, 116 Mich. 28; *Lebbey v. Sears*, 38 Ia. 507; *Mott v. Haverman Bank*, 22 Hun, 354; *Heard v. Bank*, 8 Neb. 10; *Kimball Co. v. Mellon*, 80 Wis. 133. — Ed.

lated that there should be a part payment of £30 in earnest of the bargain. The plaintiffs paid £30 in part payment, and the potatoes were shipped by the defendant's agent at Dunkirk under the contract on board the ship *Blonde* at Dunkirk for London, in sacks sent over for the purpose by the plaintiffs. The bill of lading taken by the defendant's agent made the goods deliverable to order.

The plaintiffs therefore refused to honor the vendor's draft with the bill of lading attached. One week later the defendant by order of the vendor's agent sold the goods.

LORD CAIRNS, C. In this case it appears, from the judgments below, that the Court of Common Pleas drew the inference of fact that the plaintiffs were not in default in refusing to accept the draft for £34 which was tendered to them for acceptance along with the bill of lading. We have been unable to reconcile this finding with the statements in the case, more particularly with the statement in paragraph 13 (9), which seems to us to show that the plaintiffs were in default. Taking this fact, as we understand it, we think that the judgment in favor of the plaintiffs is erroneous, and should be reversed. The transactions in which merchants shipping goods on the orders of others protect themselves by taking a bill of lading, making the goods deliverable to the shipper's order, involve property of immense value, and we are unwilling to decide more than is required by the particular case. But we think this much is clear, that where the shipper takes and keeps in his own or his agent's hands a bill of lading in this form to protect himself, this is effectual so far as to preserve to him a hold over the goods until the bill of lading is handed over on the conditions being fulfilled, or at least until the consignee is ready and willing and offers to fulfil these conditions, and demands the bill of lading. And we think that such a hold retained under the bill of lading is not merely a right to retain possession till those conditions are fulfilled, but involves in it a power to dispose of the goods on the vendee's default, so long at least as the vendee continues in default. It is not necessary in this case to consider what would be the effect of an offer by the plaintiffs to accept the draft and pay the money before the sale, for no such offer in this case was ever made.

*Judgment reversed.*¹

¹ Compare: *Pegg v. Wisdell*, 16 Beav. 239; *Howe v. Smith*, 27 Ch. D. 89; *Henderson v. Hicks*, 58 Cal. 364; *Asia v. Hiser*, 38 Fla. 71; *Bagley v. Findley*, 82 Ill. 524; *Thaxter v. Sprague*, 159 Mass. 397; *McArthur v. Bank*, 122 Mich. 223; *Campbell v. Hicks*, 19 Ohio St. 433; *Bank v. Cummings*, 89 Tenn. 609. — Ed.

MIRABITA v. IMPERIAL OTTOMAN BANK.

COURT OF APPEAL, 1878.

[3 Exch. Div. 164.¹]

BRAMWELL, L. J. This case has been argued on the footing that the law of England or a like law is applicable, and we must so deal with it. We must treat as the governing bargain between the plaintiff and Phatsea & Co., the one made at the time it was arranged that the payment should be made by a bill at two months, and that the vendees should not be entitled to the 600 tons of umber, or bills of lading of them, until payment of the bill of exchange. No question arises as to the defendants' rights; for it was admitted, and properly admitted, that the defendants did wrong in refusing the amount of the bill, and selling the umber. On the other hand, there is no contract between the plaintiff and the defendants. So that in the result the case is reduced to this: When the defendants tortiously disposed of the umber, had the plaintiff such a property therein, or right thereto, as to entitle him to maintain this action? It is argued that he had not, and the reason given is, that as the umber was not specific and ascertained, and as on shipment the shippers took a bill of lading to order, and gave an interest in it to Corkji, who transferred it to the defendants, no property passed; and for this a long series of authorities, beginning with *Wait v. Baker*, 2 Ex. 1, and ending with *Ogg v. Shuter*, 1 C. P. D. 47, is cited. It is almost superfluous to say that by these authorities I am bound, that I pay them unlimited respect, and I may add I do so the more readily as I think the rule they establish is a beneficial one. But what is that rule? It is somewhat variously expressed as being either that the property remains in the shipper, or that he has a *jus disponendi*. Undoubtedly he has a property or power which enables him to confer a title on a pledgee or vendee, though in breach of his contract with the vendor. This appears from *Wait v. Baker*; *Gabarron v. Kreeft*, Law Rep. 10 Ex. 274; and to some extent from *Ellershaw v. Magniac*, 6 Ex. 570. In the first case, Parke, B., expressly says that the vendee Baker could under the circumstances maintain an action against Lethbridge for having sold the barley to Wait. This property or power exists then; and therefore if the vendors of the umber had sold it to the defendants this action would not be maintainable. But in that case the defendants would have acquired a right, while, as I have said, it is admitted that no right in them can be relied on. I think it is not necessary to inquire whether what the shipper possesses is a property, strictly so called, in the goods, or a *jus disponendi*, because I think, whichever it is, the result must be the same, for the following reasons. That the vendee has an interest in the specific goods as soon as they are shipped is plain. By the con-

¹ Only one opinion is printed. — Ed.

3 shippers could
have passed
title to shipper
but did not
in this case

tract they are at his risk. If lost or damaged, he must bear the loss. If specially good and above the average quality which the seller was bound to deliver, the benefit is the vendee's. If he pays the price, and the vendor receives it, not having transferred the property, nor created any right over it in another, the property vests. It is found in this case that as far as intention went the property was to be in the plaintiff on shipment. If the plaintiff had paid, and the defendants had accepted the amount of the bill of exchange, it cannot be doubted that the property would have vested in the plaintiff. Why? Not by any delivery. None might have been made; the defendants might have wrongfully withheld the bills of lading. The property would have vested by virtue of the original contract of sale. It follows that it vested on tender of the price, and that whether the vendor's right was a right of property or a *ius disponendi*; for whichever it was it was their intention that it should cease on the plaintiff's paying the price, and therefore it would cease unless meanwhile some title had been conferred on a third person to something more than the price. This, though wrongful as regards the plaintiff, would have been valid. But no such title exists here. There is nothing in the authorities inconsistent with this. The only case that may be thought to seem so is *Wait v. Baker*, *supra*, where, though the vendee tendered the price, he was held to have acquired no property. But it is manifest that in that case the vendor originally took the bill of lading to order, and kept it in his possession, to deal with as he thought fit, and never intended that the property should pass until he handed the bill of lading to the vendee on such terms as he chose to exact. Parke, B., says: "There is no pretence for saying that Lethbridge agreed that the property should pass." "There was nothing that amounted to an appropriation, in the sense of that term, which alone would pass the property." "There was no agreement between the two parties that that specific cargo should become the property of the defendant," the vendee. Here all the evidence shows that there was such an agreement. The arbitrator says it existed in fact at the time of shipment, but the subsequent conduct of both parties shows it. What seems decisive is this: the plaintiff must have a right against some one; has he any against Phatsea? Now Phatsea has done nothing that he had no right to do, and he has done everything he was bound to do, treating the altered agreement as governing. No action therefore would lie against him. It must then be the defendants who are in the wrong. I think they are, that the property was to pass on payment, and consequently on tender of payment, of the bill of exchange; that the bill of lading was handed to the Larnaca Bank to be delivered to the plaintiff on payment of the bill of exchange; that therefore the plaintiff can maintain this action, and the judgment should be affirmed. I would add that I agree with the reasoning of my Brother Cleasby in the court below; and I would further remark that I believe this is a question which would not have been open to the slightest doubt if the action had been brought after the

coming into operation of the Judicature Acts. COTTON, L. J., has favored me with a perusal of his judgment, and I entirely agree with it.¹

VERNON *v.* STEPHENS.

CHANCERY, 1722.

[2 P. Wms. 66.]

THE plaintiff brought this bill for a specific performance of articles entered into by the defendant's father Stephens, to the plaintiff, for sale of the manor of Wheelock in Cheshire for £1,200 and 100 guineas.

There had arose some difficulty about the title, and the plaintiff insisting that the same was not good, without an act of Parliament, the defendant's father procured an act of Parliament; upon which the plaintiff paid part of the money, but making default in payment of the residue, the defendant's father brought a bill to have the residue of the money, or to be discharged of the articles.

Just before that bill was ready for hearing, the plaintiff and defendant's father entered into an order by consent, signed by both parties, and reciting the articles, by which the plaintiff agreed to pay the money by such a day, or in default thereof the articles to be delivered up and cancelled, and the defendant's father to hold the premises discharged of the articles. Then the plaintiff paid £1,000 in part, but made default in payment of the residue, and entered into another order by consent signed by both parties, whereby a further day was given, when, if the money was not paid, the plaintiff agreed to lose all the money which he had advanced before, and to lose the benefit of the articles, which were to be put into the hands of Mr. Cox the counsel, and delivered over to the defendant's father in default of payment, and in case of such default, the defendant's father to hold the premises discharged of the articles.

The plaintiff Vernon, having again made default, now brought this bill to have the purchase completed, on payment of what was due, with interest, and to be relieved against these orders.

LORD CHANCELLOR. Here have been solemn agreements that ought not slightly to be got over; but however, if the defendant has his money, interest and costs, he will have no reason to complain of having suffered; on the contrary, it would be a very great hardship on the plaintiff, to lose all the money which he has paid; lapse of time in payment may be recompensed with interest and costs; and as to these agreements, they were all intended only as a security for payment of

¹ Compare: *Wait v. Baker*, L. R. 10 Ex. 274; *Wilrushurst v. Bowker*, 7 M. & G. 882; *Martindale v. Smith*, 1 Q. B. 389; *Ex parte Banner*, 2 Ch. D. 278; *Young v. Mertens*, 27 Md. 144; *Bergman v. R. R.*, 104 Mo. 77; *Bellefontaine v. Vassaux*, 55 Ohio St. 323; *Charles v. Carter*, 99 Tenn. 607. — ED.

the money, which end is answered by the payment of principal, interest and costs.

In 1720, when the money was to have been paid, there was a great scarcity of money, they in whose hands it was, locking it up; also, at that time, the defendant's father was dead, which was the act of God, and his executors not acting, it was some time before the defendant took out administration with the will annexed of his father, which was the default of the party; so that the plaintiff's payment of the money at the exact time was dispensed with.

Let the plaintiff be relieved upon payment of principal, interest and costs.¹

BUTTON *v.* SCHROYER.

SUPREME COURT, WISCONSIN, 1856.

[5 Wis. 598.]

THE complainant entered into a written contract with the defendant for the sale of a certain tract of land. A part of the purchase money was paid down, the remainder to be paid in instalments, and when fully paid, a conveyance of the title in fee simple to be made. Some of the instalments of purchase money remained unpaid after they had become due and payable by the terms of the contract (the vendee being in possession), and the vendor filed his bill to foreclose or extinguish the equity of redemption of the vendee. The Circuit Court made the usual decree of foreclosure and sale, as in case of mortgage, and the defendant appealed.

PER CURIAM. This is an ordinary case of a contract for the sale and conveyance of real estate, part of the purchase money having been paid and possession taken, and the title withheld as security for the remainder of the purchase money. There is no doubt but that a court of equity has jurisdiction in such cases, as well to relieve the vendor as the vendee upon failure to comply. The relation between the parties is analogous to that of equitable mortgagor and mortgagee. The former has an equity of redemption, the latter has the correlative right of foreclosure. A court of equity will relieve against forfeiture from non-compliance on the part of the vendee, but will enforce performance within a reasonable time.

But as the title did not pass by the contract, but remained in the vendor, we think the decree of sale erroneous. The proper decree in

¹ Compare: Reynolds *v.* Nelson, 6 Madd. 18; Parker *v.* Thorold, 16 Beav. 59; McCabe *v.* Matthews, 155 U. S. 550; Robertson *v.* Read, 52 Ark. 381; Byers *v.* Denver Co., 13 Col. 552; Brown *v.* Ward, 110 Ia. 123; Munroe *v.* Edwards, 86 Mich. 91; Jones *v.* Robbins, 29 Me. 51; Barnard *v.* Lee, 97 Mass. 92; Ewing *v.* Gordon, 49 N. H. 444; Day *v.* Hunt, 112 N. Y. 191; Hall *v.* De La Plaine, 5 Wis. 206. — AMES: CASES ON EQUITY, 330 n. and 339 n.

such cases is, that the money due upon the contract be paid within such reasonable time as the court may direct, or that the vendee be foreclosed of his equity of redemption.

*Decree reversed, and cause remanded.*¹

• HECKARD v. SAYRE.

SUPREME COURT, ILLINOIS, 1874.

[34 Ill. 142.]

MR. JUSTICE BECKWITH delivered the opinion of the court:

This is a suit in equity to enforce the specific performance of a contract for the sale of a tract of land in Fulton County.

On the eighteenth day of September, 1857, the plaintiff in error bargained with the defendant in error, to sell him the land for the sum of \$900. One hundred and five $\frac{1}{100}$ dollars were then paid, and two notes were given for the residue; one for \$494 $\frac{11}{100}$ payable on or before Oct. 25, 1857, and the other for \$300, payable on or before Sept. 1, 1858.

The contract between the parties provided, that the above notes should be paid at maturity; that the time stipulated for their payment should be regarded as of the essence of the contract; and that the non-payment of either of the notes when they should become due, should be considered as an avoidance of the vendor's obligation, and as an absolute forfeiture of all payments previously made. The note maturing first was paid at maturity, and a tender of the amount due upon the other note was made on the seventh day of September, 1858, six days after it fell due.

The bill alleges a waiver by the vendor of the prompt performance of the agreement; and sets up as an excuse for the vendee's neglect to make the last payment at the time required, that he was engaged in the discharge of his official duties as clerk of the Circuit Court of Fulton County.

There is no evidence of any waiver by the vendor of the stipulation in regard to time, and we think the excuse alleged is entirely insufficient. The term of the court at which the defendant in error was required to attend, commenced on the sixth day of July, 1858, and he might have employed some one to transact his business with the plaintiff in error, if it was not convenient to attend to it in person. Such

¹ Compare: Hughes v. Hatchett, 55 Ala. 631; Hester v. Hunnicutt, 104 Ala. 382; Martin v. O'Bannon, 35 Ark. 62; Odd Fellows Bank, 124 Cal. 255; Huffman v. Canble, 86 Ind. 591; Meagher v. Hoyle, 173 Mass. 577; Denton v. Scull, 26 Minn. 325; Loveridge v. Shuntz, 111 Mich. 618; Lewis v. Chapman, 59 Mo. 371; Brown v. Norcross, 59 N. J. Eq. 427; Freeman v. Bissell, 63 N. Y. 168; Allen v. Taylor, 96 N. C. 37; Whitmore v. Bond, 55 S. C. 315; Johnson v. Kurtz, 97 Tenn. 503. — AMES: CASES ON EQUITY, 226 n.

an excuse, if allowed, would exempt the clerks of many courts in this State from ever discharging their obligations.

From the allegations of the bill it appears, that the complainant did not have the money to make the last payment at the time it became due; and stipulations like the one in the contract under consideration, would be of little value if they were to be enforced only in cases where parties making them had the money with which they might be discharged. No rule is more firmly settled than that parties may make time of the essence of a contract. In this case the parties have so made it, in plain and unambiguous language.

At law the defendant in error has no remedy for a breach of the agreement by reason of his own non-performance. He was not hindered or prevented in the discharge of his obligations by any fraud, accident or mistake; and under such circumstances equity must follow the law. A court of equity has no more right than a court of law to dispense with an express stipulation of parties in regard to time, in contracts of this nature, where no fraud, accident, or mistake has intervened. To relieve from the effect of such stipulations, except on the grounds named, would practically deny the right of parties to make them. Such relief would result in great injustice to vendors. Usually the price of lands in this country is fixed with reference to prompt payment; and where they are an article of commerce, it is often of the last importance to a vendor to receive his money promptly. We have all known men of affluence reduced to penury by neglect in making such payments as they became due. A vendor may require the payments to be made promptly to enable him to meet his own engagements; and for that purpose a stipulation may be inserted in the contract that time shall be of its essence. If courts were to allow a vendee to neglect to make his payments at the stipulated times, where he is not hindered or prevented from so doing by fraud, accident, or mistake, the consequences of his negligence would be visited upon his vendor. Justice does not require relief from the result of one's own negligence. Courts of equity in such cases refuse to interfere; and leave the parties to their remedies at law, if any they have, for the reason that there is no equity requiring such an interposition.

It was urged in argument that the plaintiff in error might compel the payment of the note of the defendant in error, but if he should do so, an equitable right to a conveyance of the land would then exist which, upon proper application, would be enforced. Equity would not allow the plaintiff in error to collect the residue of the purchase money and hold the land, but until he attempts its collection no such equity arises.

The decree of the court below is reversed, and the cause remanded.

*Decree reversed.*¹

¹ Compare: *Begg v. Wisden*, 16 Beav. 239; *Green v. Sevin*, 13 Ch. D. 589; *Hasborough v. Peck*, 5 Wall. 497; *Hock v. Howard Co.*, 123 Cal. 1; *Prince v. Griffin*, 27 Ia. 514; *Thaxter v. Sprague*, 159 Mass. 397; *Coles v. Shepard*, 30 Minn. 446; *Maloy v. Muir*, 60 Neb. 173; *Snider v. Lehnherr*, 50 Eq. 385. — AMES: CASES ON EQUITY, 343 n.

HAYS v. JORDAN & CO.

SUPREME COURT, GEORGIA, 1890.

[85 Ga. 741.1]

JORDAN & Co. sued Mrs. Sudie Hays in bail-trover for an "opera piano," alleged to be of the value of \$350, and also, in the same action, sued her upon an alleged indebtedness of \$35 attorney's fees. The piano was seized by the sheriff, and Mrs. Hays having failed to give the bond required by law to retain the same, the plaintiffs gave bond and took possession of the piano. Mrs. Hays had paid \$100 down, upon receipt of the piano, for which she claims allowance.

SIMMONS, JUSTICE. The court below must have regarded the \$100 paid by the defendant, under this note, as in the nature of rent for the use of the piano for the two months during which she had held it, and as lost to the defendant in the event of her failure to pay the remainder of the amount agreed upon. Although the contract does use the term "rent" and states that the notes are given for the "use" of the piano, we do not so construe it, but regard it, not as a lease or renting, but as a conditional sale with title reserved in the vendor until the purchase price is paid. *Guilford Wood & Co. v. McKinley*, 61 Ga. 232. The entire \$350 styled "rent" is made payable within six months from the date of the transaction, and is the stipulated value of the piano and the consideration for a bill of sale to be given when the full amount is paid; and the sale of the piano, and not the renting thereof, is evidently the real end and basis of the contract.

The contract being, then, a conditional sale and not a lease, and the payments made thereunder not rent but purchase money, the plaintiffs have no right to retain them as rent. And there is no express stipulation that they shall be treated as a forfeiture. "Forfeitures are abhorred in equity and are never favored in law," and provisions for forfeiture are regarded with disfavor and construed with strictness, when applied to contracts and the forfeiture relates to a matter admitting of compensation or restoration. Where adequate compensation can be made, the law in many cases and equity in all cases discharges the forfeiture upon such compensation being made. The law inclines to remedy breach of condition by damages rather than by forfeiture. Code, § 2295; Story Eq. Jurisp. §§ 1312, 1314, 1316 *et seq.* "On sale reserving title till the price is paid, many of the cases hold that partial payments are forfeited on default of the residue; but in courts possessing equity powers, the modern tendency is to allow the seller who rescinds a contract for default after receiving part of the price, to retain only so much as will compensate him." Newmark on Sales, § 306; *Preston v. Whitney*, 23 Mich. 260, 267; *Johnson v. Whittemore*, 27 Mich. 463, 470. In this case, under the practice in this

¹ This case is abridged. — Ed.

State, it was within the power of the court to mould the verdict so as to do full justice to the parties, and in the same manner as a decree in equity. Code, §§ 3562, 3082; Acts 1884-5, p. 36; Acts 1887, p. 64. Although the plaintiffs elected to take the piano and not to take a money verdict for damages, as they had a right to do, under section 3564 of the code, yet we do not think that they were entitled to recover the piano and retain all the money received from the defendant. We think that, under our law, the court should have instructed the jury to so mould their verdict as to do justice to all parties; and should have instructed them that if the plaintiffs elected to take the specific property, and a part of the purchase money had been paid, the plaintiffs were entitled to recover the property itself, but before they could recover, they must return the money which the defendant had paid them, after deducting a proper amount for the use of the piano, if the use was of any value to the defendant; which amount the jury should arrive at from the evidence, finding the balance, with interest, in favor of the defendant against the plaintiffs, the piano to be returned to the plaintiffs upon payment to the defendant of the amount thus found. Where the plaintiff obtains possession of the piano by bail process, as was done in this case, the court can enter judgment for the amount found for the defendant upon the plaintiff's bond.

*Judgment reversed.*¹

SAWYER v. PRINGLE.

CHANCERY DIVISION, ONTARIO, 1890.

[20 Ontario, 111.]

THIS action was brought by the members of the firm of L. D. Sawyer & Co., formerly carrying on business as manufacturers of agricultural instruments, against Alva N. Pringle, a thresherman and farmer, to recover the balance due in respect of certain promissory notes given by him for the purchase money of a traction engine and separator sold to him by the plaintiffs, under and in pursuance of a written agreement dated April 25, 1888.

The price under the agreement was to be \$1,600, secured by promissory notes, which were to be signed and sent to the plaintiffs within ten days after the machines were started, and were the notes now being sued on.

The agreement contained a clause, whereby it was provided that the property in the machines should not pass to the defendant till payment in full, and that the plaintiffs might resume possession on default of

¹ Compare: *Cornwall v. Hanson*, 1900, 2 Ch. 298; *Latham v. Davis*, 44 Fed. 862; *Latham v. Sumner*, 89 Ill. 233; *Manton v. Baldwin*, 17 Mass. 606; *Tufts v. Decarroll*, 85 Mich. 191; *Ketchum v. Breman*, 53 Mich. 196; *Haveland v. Johnson*, 7 Daly, 297; *Sage v. Sleutz*, 23 Ohio St. 4. — ED.

payment when the whole payment should become due, and also on other good cause, and other provisions not necessary to be mentioned here.

Default having occurred in payment of the first of the notes, the plaintiffs resumed possession of the machines, and sold them at auction, realizing \$1,027.80 at such sale.

The plaintiff now claimed the balance alleged to be due on the notes after giving credit for this sum.

ARMOUR, C. J. There is no permission in this order that the plaintiffs may, after resuming possession, sell the machine and recover from the defendant the difference between the price of the machine and the price at which it was sold after they resumed possession of it.

The plaintiffs by resuming possession and afterwards selling the machine, disentitled themselves to sue either upon the order or upon the notes mentioned therein: *Lamond v. Davall*, 9 Q. B. 1030; *Hine v. Roberts*, 48 Conn. 267; *Loomis v. Bragg*, 50 Conn. 228; *Third National Bank v. Armstrong*, 25 Minn. 530; *Minneapolis Harvester Works v. Hally*, 27 Minn. 495.

In my opinion the action must be dismissed with costs.¹

TANNER & DELANEY ENGINE CO. *Hall.*

SUPREME COURT, ALABAMA, 1889.

[89 Ala. 678.]

750 187

STONE, C. J. The notes sued on were given as purchase-money for an engine, mill and fixtures, which were delivered to the purchasers. In the body of the notes, it was "agreed that the ownership and title of the said machinery remains in said Tanner & DeLaney Engine Company until this note is paid." Plaintiff sued out an attachment against Hall & Mobley, the apparent makers of the notes, and had it levied on the engine, mill and machinery, as the property of Hall & Mobley. This was in the State of Florida, where the machinery was situated. Under this proceeding, the property was sold, and the plaintiff became the purchaser at something less than five hundred dollars. There was proof tending to show that the engine and machinery were worth more than they sold for, and the plaintiff subsequently sold them at a price considerably above the sum for which he purchased them at the attachment sale. The main question of contest in this case is, whether the makers of the notes are entitled to a credit for the increased price obtained by plaintiff, in the re-sale of the engine, mill and fixtures.

¹ Compare: *Lamond v. Davall*, 9 Q. B. 1030; *Aultmann v. Fletcher*, 110 Ala. 452; *Parke v. Lumber Co.*, 101 Cal. 37; *Hine v. Roberts*, 48 Conn. 267; *Fleck v. Warner*, 25 Kans. 492; *Brown v. Hays*, 52 Me. 578; *Duke v. Schackelford*, 56 Miss. 552; *Porter v. Pettingill*, 12 N. H. 299. — ED.

The retention of title by the seller is a clause of the contract inserted for his benefit. It is, at most, a form of security for the payment of the purchase-money. It is not absolute ownership; for payment of the debt, or tender within a reasonable time, kept good, would divest the seller's title. So far as the rights of the purchasers were concerned, they were the owners of the property, subject only to the right and option of the seller to assert his reserved title, and the security it afforded. He alone could assert this, and he had the equal right to waive it, and treat his claim as an ordinary debt of the purchasers. And in the exercise of this option, he was entirely independent of any control or wish the purchasers could assert or make known. — *Woolridge v. Holmes*, 78 Ala. 568, and authorities collated; *Summer v. Wood*, 77 Ala. 139.

The attachment in Florida, and sale under it, were an election to treat the property as belonging to the purchasers, and not to assert the title and lien reserved in the seller. If a stranger had purchased at that sale, there can be no question that he would have acquired a good title, and the Tanner & DeLaney Engine Company would have been estopped from asserting its lien, or reserved ownership. The plaintiff had an equal right to purchase, and acquired an equally good title by its purchase. The defendant was not entitled to the increase of price realized on the re-sale, any more than he would have been required to suffer the loss, if the property had been destroyed subsequent to the sale, or could not have been re-sold except at a loss. This rule, however, applies only to personal property, the title to which may pass without writing. A different rule obtains when title to real estate is retained as security. *Powell v. Williams*, 14 Ala. 476.

Several charges of the court are in conflict with the views expressed above.

*Reversed and remanded.*¹

SPALDING v. RUDING.

CHANCERY, 1843.

[6 Beav. 376.]

THE MASTER OF THE ROLLS. I apprehend it to be clear, that the indorsement and delivery of the bill of lading by Thomas the consignee to Ruding, for valuable consideration, gave to Ruding the legal right to the delivery and possession of the goods. That right is not disputed by this bill, but the plaintiffs insist, that under the contract

¹ Compare : *Iron Works v. Smith*, 98 Ala. 644 ; *Barr v. Logan*, 5 Harr. 52 ; *Cook v. Branders*, 3 Metc. 555 ; *Haskell v. Rice*, 11 Gray, 240 ; *Holland v. Rae*, 48 Mich. 218 ; *Gordon v. Norris*, 49 N. H. 376 ; *Van Brocklen v. Smeallie*, 140 N. Y. 70 ; *Sage v. Slentz*, 23 Ohio St. 1 ; *Rosenbaums v. Weeden*, 18 Gatt. 785 ; *Mathews v. Lucia*, 55 Vt. 388. — ED.

subsisting between Thomas and Ruding, the right to the possession of the goods was vested in Ruding, only as a security for the repayment to him of his advance and charges, and that subject to that security, the plaintiffs, in the consideration of a court of equity, retained their right to a stoppage *in transitu* against the assignee or indorsee of the bill of lading; it appears that in the case of *Westzinthus* the Court of Queen's Bench held, that in such a case, a court of equity would hold such a transfer to be a pledge or mortgage only, and that the attempt to stop *in transitu* gave a right to the goods, in equity, subject only to the lien for the advance.

The propriety of that opinion was questioned, but, as it appears to me, without sufficient reason. As against Thomas, I think that the plaintiffs had a right to stop the goods *in transitu*; and, although the legal right to the goods was transferred with the bill of lading, yet I think, that in equity, the transfer took effect only to the extent of the consideration paid by the transferee, leaving in the plaintiffs an equitable interest in the surplus value.

In the argument for the defendants it was urged, that they, in the character of factors for Thomas, had an interest of their own to retain the surplus value in satisfaction of a balance due to them from Thomas; and, secondly, that any interest of the plaintiffs, though of an equitable nature, might be made available in an action to be brought by them against the defendants in this cause; but the goods came to the hands of Ruding under a special contract, interfering with any general right which he might have as factor; and, even if the defendants were entitled to be considered as factors of Thomas, having a balance due to them, it does not appear to me, that, as against the plaintiffs the owners and shippers of the goods entitled to stop *in transitu*, they could, by virtue of the bill of lading, have a right to retain more than the consideration they paid for the advantage which the bill of lading gave them; and as to the action, the legal right to the goods being clearly in the defendants, it does not appear to me that the plaintiffs could have obtained, at law, that relief which I think them entitled to here.

I am therefore of opinion that the plaintiffs are entitled to the decree which is asked by the bill, and that an account must be taken of the moneys received by the defendants in respect of the wheat in question, and of the moneys due to the defendants on the security of the bill of lading, and that the balance may be ascertained and paid to the plaintiffs by the defendants.¹

¹ Compare: *Wiseman v. Vandeputt*, 2 Vern. 1690; *Lickbarrow v. Mason*, 5 T. R. 683; *Bohlings v. Ingles*, 3 East, 381; *Matter of Westzinthus*, 5 B. & Ad. 817; *Ex parte Golding*, 13 Ch. D. 628; *The Idaho*, 93 U. S. 575; *R. R. v. Treed*, 38 Ark. 614; *Newhall v. R. R.*, 57 Cal. 345; *Johnson v. Eveleth*, 93 Me. 306; *Boceon v. Lumber Co.*, 179 Mass. 220; *Becker v. Hallgarten*, 86 N. Y. 167; *Drew v. Koblitz*, 49 Ohio St. 41; *R. R. v. Heilerheimer*, 82 Tex. 195; *Eaton v. Cook*, 32 Vt. 58 — WILLISTON: CASES ON SALES, pp. 357-435 *passim*.

POLLARD *v.* REARDON.

CIRCUIT COURT OF APPEALS, 1895.

[65 *Fed.* 848.¹]

IN August, 1888, one N. B. Mansfield made a bill of sale to Pollard, Pettus & Co., of New York, of a quantity of hides then on the coast of Africa, and loaded, or about to be loaded, on a vessel for shipment to said Mansfield. The bill of sale was given as security for the renewal of a note of Mansfield's for \$10,500, held by Pollard, Pettus & Co. In October, 1888, in consideration of the indorsement by one Edmund Reardon of a note for \$8,000, Mansfield gave to Reardon a memorandum of sale of the hides, agreeing to deliver the bill of lading when received. In November, 1888, the bill of lading was received by Mansfield, and by him indorsed and delivered to Reardon. The note indorsed by Reardon was once renewed, and before the arrival of the hides the renewal note was protested, and paid by Reardon. On the 8th of April, 1889, the vessel carrying the hides arrived, and on the 16th of April a permit was issued to Reardon by the collector of customs to land the hides. April 17th, Pollard, Pettus & Co. demanded the hides from the collector, and immediately afterwards brought this suit to foreclose the chattel mortgage evidenced by their bill of sale, and to enjoin the delivery of the hides to Reardon. At the time of the institution of the suit there remained due on the note of Mansfield to Pollard, Pettus & Co. \$3,334.30, but they claimed that the hides were conveyed to them as security also for a balance due to them from Mansfield on general account. The court found in their favor as to the balance due on the note only, and this they assigned as error.

PUTNAM, Circuit Judge. On the whole, the legal principles applicable seem clear, and, if the case involves any obscurity, we think it is because those principles have not been freely stated or applied. In the developments of commerce and commercial credits the bill of lading has come to represent the property, but with greater facility of negotiation, transfer, and delivery than the property itself. It is a negotiable instrument, even though not in the same sense as promissory notes or bills of exchange. It carries on its face, in the words "and assigns," an authority to dispose of it, and, as we have seen, a like authority when indorsed in blank, by which the person who voluntarily puts it out, or permits it to be put out, ought to be estopped. And it has become so universal and necessary a factor in mercantile credits that the law should make good what the bill of lading thus holds out. There is every reason found in the law of equitable estoppel and in sound public policy for holding, and no injustice is involved in holding, that, if one of two must suffer, it should be he who voluntarily puts out of his hands an assignable bill of lading, rather than he who innocently advances value thereon.

¹ This case is abridged. — Ed.

When Pollard, Pettus & Co. accepted from Mansfield a bill of sale of the hides in question, they knew that in the regular course of business a clean bill of lading for them would issue to him, clothing him with the customary *indicia* of absolute ownership. They took the chances arising from this. They must stand as though they assented to it, and they can claim no right against any one who dealt with Mansfield in good faith relying upon it. Their presumed assent to the issue of the bill of lading to Mansfield is emphasized by their laches in applying for it. Whatever may be the nature of their right, it cannot prevail against Reardon's title under the bill of lading.

There is no question touching Reardon's *bona fides*. That his advances constituted a present consideration for value is sustained by *Leask v. Scott*, 2 Q. B. Div. 376. This case seems to be now regarded in England as settled law. When Reardon first made his advances he did it with a stipulation that the bill of lading should be delivered to him as soon as it arrived. Consequently the delivery of it to him on arrival, in connection with the prior stipulation, constituted in equity but one transaction. Moreover, while Mansfield was still apparently solvent, Reardon renewed his advances on the strength of it.

The decree of the circuit court is reversed, and the case remanded to that court, with directions to enter a decree dismissing the bill, with full several costs in that court for Saltonstall, and with full several costs in this court and in that court for Reardon.¹

¹ Compare: *Snee v. Prescott*, 1 H. & R. 245; *Shaw v. R. R.*, 101 U. S. 557; *Bank v. McGraw*, 76 Fed. 930; *Cevallars v. Texas Co.*, 110 Cal. 348; *Douglass v. Bank*, 86 Ky. 1176; *Peters v. Elliot*, 78 Ill. 321; *Moors v. Coyman*, 146 Mass. 95; *Dows v. Perrin*, 16 N. Y. 325; *Bank v. Logan*, 74 N. Y. 568; *Moors v. Kidder*, 106 N. Y. 32; *Emery Sons v. Irving Bank*, 25 Ohio St. 360. — WILLISTON: *CASES ON SALES*, pp. 304-356, *passim*.

CHAPTER II.

SITUATION IN MORTGAGE.

DIVISION I.—ELEMENTS OF MORTGAGE.

SECTION I.—THE SECURITY.

SEABOURNE v. POWELL, AUSTIN AND MACKLEY.

CHANCERY, 1686.

[2 Vern. 11.]

THOMAS COWLS demises houses and grounds in Chick-lane, in 1674, for a long term to build upon; which term came by assignment to the defendant Austin and her husband, which they believed to be a good title, and borrowed £100 of the defendant Mackley's wife, upon a mortgage of it, for which the plaintiffs became bound. That the defendant Austin's husband nine years since ran away for debt, and they thinking their title good, had borrowed, and built upon the ground with it, and but £15 of Kerrington's money was that way employed. Seven years after her husband's going away, the defendant Austin found her title not good, the real title being in one Haynes; and he compassionating her case, for ten guineas fine, leased the premises for a long term, at four pounds yearly rent, in trust for her to the defendant Powell *et al.*, and she had instigated Mackley to sue the plaintiff upon the bond for the mortgage-money.

The plaintiff's bill was, that though the mortgage might not in strictness of law be good, yet the estate granted by Haynes was, in regard of the moneys laid out in building upon the other title, and that the estate mortgaged was of better value than the mortgage, besides what was reserved to be paid to Haynes; and that the mortgagee had therefore a plain equity, to have the benefit of that title, which was but a graft into that stock from which he derived; and that the defendant Alice had since the taking of that estate (and so it appeared on proof) paid the interest to the mortgagee; and that therefore the plaintiffs being but sureties in the bond had an equity to have the benefit of the mortgage, and of that new acquired title, to save them harmless against

the bond; or else the trustees ought to be decreed to make a new mortgage to the mortgagee; and he to forbear suing upon the bond.

THE MASTER OF THE ROLLS in this case, did look upon the estate made by Haynes to be as a graft into the old stock, and the benefit of it above £4 per annum reserved to Haynes did arise in consideration of the former title; and therefore did decree the trustees to make a new mortgage to the mortgagee.¹

LEIGH v. BURNETT.

CHANCERY, 1885.

[29 Ch. D. 231.]

ON the 10th of November, 1863, the equity of redemption of a leasehold house in South Street, Chichester, was assigned to W. H. Newman. The lease was then subject to a mortgage, which afterwards became vested in R. Ingram and C. E. Dawkins, two of the defendants to this action. The lease had been granted on the 2d of May, 1853, by the Dean and Chapter of Chichester, in consideration of the surrender of a former lease and of the payment of a fine, to William Skelton, for the term of thirty years from the 29th of September, 1851. It had been the custom of the Dean and Chapter to renew the leases of their property, but the lease contained no covenant for renewal. The reversion in fee became afterwards vested in the Ecclesiastical Commissioners, who would not renew the lease. In the year 1880 Newman was negotiating with the Commissioners for the purchase of the reversion in fee, and on the 20th of October, 1880, he borrowed £300 from the plaintiff Jessie Emma Leigh, the wife of the plaintiff Thomas Leigh, giving her a memorandum in writing which stated that the £300 was to be secured by a mortgage from him to her of the house in South Street, so soon as he had completed "the enfranchisement of the said property from the Ecclesiastical Commissioners," and that, meanwhile, he had deposited in her hands his title-deeds of some property at Lyndhurst. Mrs. Leigh, when she advanced the £300, had no notice of the mortgage of the leasehold interest to the defendants Ingram and Dawkins. Newman afterwards concluded an agreement with the Commissioners for the purchase of the reversion, but the conveyance to him was not executed until December, 1881.

¹ Compare: *Owen v. Williams*, Ambl. 688; *Hart v. Middlehurst*, 3 Atk. 376; *Postlethwaite v. Lewthwaite*, 2 J. & H. 237; *Ranelagh's Will*, 25 Beav. 57; *Griggs v. Banks*, 59 Ala. 312; *Moore v. Little Rock*, 42 Ark. 66; *Hill v. O'Brien*, 104 Ga. 137; *Coury v. Toomer*, 86 Ia. 577; *Evans v. Merriken*, 8 Gill & J. 39; *Gould v. Newman*, 6 Mass. 239; *Wark v. Willard*, 13 N. H. 389; *McGuinnis v. Noble*, 7 W. & S. 454; *Patterson v. Harlan*, 124 Pa. 67; *Hathaway v. Juneau*, 15 Wis. 262. — Ed.

On the 25th of January, 1882, Newman was adjudicated a bankrupt. The plaintiffs claimed a declaration that they were entitled to an equitable charge for the £300 on the house in South Street, and that the mortgage might be enforced by foreclosure or sale. The defendant Burnett was the trustee in bankruptcy of Newman.

PEARSON, J. Newman entered in the negotiation with the Ecclesiastical Commissioners as being the *de facto* lessee of the property, and, while the negotiation was in progress, he borrowed £300 from the plaintiff, and gave her a charge for it on the property, which was to be conveyed to her so soon as the negotiation with the Commissioners should be completed. In December, 1881, it was completed, and the property was conveyed to him in fee simple by the Commissioners, and he paid the purchase-money for it. The question is, what is the position of the plaintiff under her memorandum of charge as regards the prior mortgagees of the lease? Is the plaintiff entitled, not to priority over those mortgagees, but to the benefit of a charge in respect of the amount which Newman paid for the purchase of the reversion. It has been argued that, as Newman was not the original mortgagor of the lease, and was under no obligation to renew the lease or to purchase the reversion, he was entitled as against the mortgagees of the lease to a lien on the property for the purchase-money, and that what he mortgaged to the plaintiff was any interest which he might have in the property when he should have completed the purchase of it, and that, consequently, that lien passed to the plaintiff, and the mortgagees of the lease are not entitled to the benefit of the purchase without satisfying the lien. To my mind there is a grievous fallacy in this argument. I can only treat Newman as a mortgagor of the lease, and in that character he could hold the reversion only on the same terms as he would have held a renewed lease of the property. The doctrine of this court has always been that the mortgagor of a renewable lease can hold a renewed lease only subject to the mortgage. The case of *Rakestraw v. Brewer* is an illustration of this doctrine. There the mortgagee of a renewable term procured from the original landlord a new term to commence from the expiration of the old one, and it was held that the new term was subject to the old equity of redemption. If Newman himself were here he would be entitled to redeem the reversion on paying off the mortgages, but he would not be entitled to say to the mortgagees of the lease, I bought the property for your benefit, and you can only have it on paying me the purchase-money which I gave for it. I cannot understand how any one who claims through Newman can be in any better position than he would have been. It is impossible for the plaintiff to say that, in respect of the purchase-money paid by Newman, she is entitled to priority over the mortgagees of the lease. I can conceive that she might be able to establish such a claim if she had advanced the money to buy the reversion, but that would be because she had no interest in the property through Newman, but was giving up a purchase on the terms of being repaid what she had given for it. As it is, she

has only a derivative title through Newman, and he could not have maintained such a claim against the mortgagees of the lease.¹

EX PARTE SAMUEL BISDEE.

BANKRUPTCY, 1840.

[1 *M. D. & De G.* 333.]

THIS was the petition of an equitable mortgagee, for a sale of the property comprised in his security, and for leave to prove for the deficiency. The bankrupt, in August, 1831, borrowed of the petitioner and one Mr. W. Bisdee, £1,300; and, as a security, gave them a bond, and deposited with them certain deeds mentioned in a schedule annexed to the bond. Some of these deeds related to property called the Steep Holmes, others to two undivided third parts in certain lands in the parishes of Blagdon and Butcombe in the county of Somerset, and another deposited deed was the conveyance to the bankrupt of the equity of redemption in other lands in the parish of Blagdon, subject to two mortgages, one for £50, dated May 15, 1817, and the other for £150, dated April 2, 1812.

SIR J. CROSS. With regard to the property in the parish of Blagdon, the bankrupt purchased the estate in fee simple, subject to certain mortgages; and before the mortgages were paid off, he deposited his title-deeds with the petitioner, as a security for money advanced; and afterwards he paid off the mortgages. I am of opinion, that the petitioner is entitled to the full benefit of his security upon the lands, which are comprised in the deposited documents, exonerated (as those lands now are) from the prior encumbrance. With regard to the premises which were taken in lieu of the undivided shares in the estates at Butcombe and Blagdon, and for which the sum of £100 was taken for equality of partition, it seems clear, that the petitioner is entitled to the benefit of his security as to these premises also.²

¹ Compare: *Rakestraw v. Brewer*, 2 P. Wms. 511; *Noel v. Bewley*, 3 Sim. 103; *Nesbitt v. Nedenwick*, 1 Ball & B. 29; *Smith v. Chichester*, 2 Dru. & W. 393; *Webster v. Power*, L. R. 2 P. C. 69; *Martin v. Beatty*, 54 Ill. 100; *Haggerty v. Byrne*, 75 Ind. 499; *Tefft v. Munson*, 63 Barb. 31; *Paddock v. Porter*, 67 Vt. 360. — ED.

² Compare: *Buckinghamshire v. Hobart*, 3 Swanst. 201; *Doe v. Pott*, 2 Doug. 709; *Harrison v. Barton*, 1 Johns. & H. 287; *Ashton v. Dalton*, 2 Coll. C. C. 565; *Jones v. Williams*, 24 Beav. 47; *Ex parte Taggart*, 1 De G. 531; *Ex parte Glynn*, 1 M. D. & D. 29; *Williams v. Mellicott*, 6 Price, 495; *James v. Bydder*, 4 Beav. 600; *Chissum v. Dewes*, 5 Russ. 29; *Kunbrell v. Rogers*, 90 Ala. 339; *Carpenter v. Breheum*, 40 Cal. 221; *Wright v. Stice*, 173 Ill. 571; *Green v. Brown*, 146 Ind. 1; *Thurston v. Minke*, 32 Md. 571; *Drew v. Carroll*, 154 Mass. 181; *Webb v. Rowe*, 35 Mich. 59; *Bank v. Ins. Co.*, 83 Minn. 377; *Kezer v. Clifford*, 59 N. H. 124; *Matter of Howe*, 1 Paige, 415; *Valley R. R. v. Livermore*, 47 Pa. 465; *Green v. Russell*, 11 R. I. 364. — ED.

BROWN *v.* STEWART.

CHANCERY, MARYLAND, 1847.

[1 *Md. Ch.* 87.¹]

BILL by mortgagee.

THE CHANCELLOR. The allegations in the bill, upon which the third, and fourth exceptions are founded, relate to the application and present position of the money for which the mortgaged slaves were sold. It was certainly material to trace this money, and discover where it is deposited, as otherwise it could not be applied at the proper time, to the payment of the claim of the complainant, should such payment hereafter be decreed. The right of the complainant to have such application made, depends upon whether the money alleged to be in the bank, arose from the sales of the slaves, or other property included in the mortgage. The bill so alleges, but the answer instead of admitting or denying this allegation, by which the money in bank could be identified with that which the defendant received from the sales of the slaves, which he confesses he sold, states that he applied the money to his, the defendant's own use. Now this identity of the money in bank, is an important fact, for upon it depends the right of the complainant, to have it appropriated specifically to the payment of his claim, the principle being, that when mortgaged property is turned into money, the mortgagee has a right to have it applied to the payment of his claim; his rights remaining unaltered by the conversion of the property into money. *Astor v. Miller*, 2 Paige, 68.

For these reasons, I am of opinion, that the injunction must be continued, and shall so order.

[No appeal was taken from this order.²]

DAVENPORT *v.* SHANTS.

SUPREME COURT, VERMONT, 1871.

[43 *Vt.* 546.]

PETITION for foreclosure of a mortgage. The petition sets forth a mortgage, executed by John G. Shants & Co., to the petitioner, October 13, 1866, of a mill and factory and tannery in Searsburg, with 200 acres of land, and three dwelling-houses thereon. "And

¹ Only one point is printed. — Ed.

² Compare: *Wheeler v. Baxter*, 101 U. S. 439; *Funk v. Trust Co.*, 89 Ia. 464; *Ball v. Green*, 90 Ind. 25; *Marcelm v. Creditors*, 21 La. Ann. 423; *Wilson v. R. R.*, 67 Me. 360; *Johnson v. Bratton*, 112 Mich. 319; *Boutelle v. Minneapolis*, 59 Minn. 493; *Thompson v. R. R.*, 110 Mo. 147; *Burkhardt v. Brooklyn*, 6 N. Y. Misc. 431; *Cleveland v. Martin*, 2 Head, 128; *Ives v. Commissioner*, Wright, 626; *Turner v. Mebane*, 110 N. C. 413. — Ed.

also the factory, then in process of erection on the site of said Sears-burg tannery, with the saw-mill, water-wheels, and all the machinery and shafting in said factory," to secure a note of \$1,000. The petition then sets forth the execution by Shants & Co., and the purchase by the petitioner, of another mortgage on the same premises, except the machinery, and also sets forth that the defendants, other than Shants & Co., claim an interest in said property.

PECK, J. The bill having been taken as confessed as to all the defendants except Henry G. Root, and he alone defending, the only question is as to the right of the orator, under his mortgage from Shants & Co., to that portion of the property sold conditionally by Root to the said mortgagors.

The bill, and answer of Root, in connection with the written stipulation of the parties on file, leave no dispute as to the material facts in the case, and no time need be spent in repeating the facts thus agreed.

It must be regarded as settled as a general rule in this State, that a party may sell and deliver personal property, under a condition that it shall remain the property of the vendor until the price is paid; and that under such contract, the title will remain in the vendor until the condition is complied with, both as between the vendor and such conditional vendee, and also as between the original vendor and a bona fide purchaser without notice from such conditional vendee. The only question is whether the facts of this case take it out of the general rule.

The proposition of the counsel of the defendant Root is, that the whole property sold conditionally by Root to Shants & Co. was personal property as well after as before the sale, and cannot properly be claimed as fixtures or as parts of the realty. But we think as between mortgagor and mortgagee, if the title of the mortgagor were absolute, the defendant's proposition is not correct; and that under the recent decisions in this State, on being put in place in the mill and factory, as shown in this case, it became so far annexed to the realty as to pass under a mortgage of the real estate. But still the question remains as between the mortgagee under his mortgage, and the original owner under his conditional sale to the mortgagor, which has the paramount right.

First, as to that portion of the property which had been put in place in the mill and factory by the mortgagors after they thus purchased it of Root, and which was in the building and thus annexed at the time the orator took his mortgage: As to this property, the orator, as it appears, having advanced his money and taken his mortgage in good faith, without notice of any lien or encumbrance upon it, and from its condition, having reason to suppose that the mortgagors' title to this property in question was the same as his title to the realty, to which it was annexed, and of which it was apparently parcel, seems to have a strong equity in his favor. While on the other hand the

defendant Root, the unpaid vendor, who endeavored to secure himself, by stipulation in the sale that he should hold the title till paid, ought not to be deprived of this security without some substantial reason. But the defendant Root must have understood, when he sold the property to Shants & Co., that they intended to put the property to use in advance of the payment of the price; and from the kind and nature of the property, he must have expected that in its use it necessarily must be annexed to the realty, substantially in the manner in which it was, and thereby become apparently parcel of the realty. What he knew or had reason to suppose and did suppose was to be done with the property, he must be taken to have consented to, as he did not object. Root therefore having, by implication at least, if not expressly, consented that the property might be incorporated with the realty of Shants & Co. in the manner it was, and they thereby become clothed with the apparent title as incident to their record title to the real estate, whereby the mortgagee was misled and induced to part with his money on the credit of the property, the equity of the mortgagee is paramount to that of the conditional vendor. Justice and equity, as well as sound policy, require this limit to the rights of a conditional vendor as between him and an innocent purchaser or mortgagee of real estate without notice, who advances his money on the faith of a perfect title.

But as to that portion of the property mentioned in the answer of the defendant Root and in the agreed statement of facts on file, which had not been placed in the mill or factory at the time of the execution of the mortgage to the orator, but was in the yard and put in place in the factory or mill afterwards, the right of the defendant Root is paramount to the right of the orator. That, not having been annexed to the realty at the date of the mortgage, would not pass as incident to the realty; and the mortgage did not divest Root of his title. It having been placed in the building by the mortgagors after the execution of the mortgage, the mortgagee might hold it as against them, but not as against Root, the conditional vendor. As to this portion of the property the mortgagee was not misled, and advanced nothing on the faith of it.

The decree of the Court of Chancery is reversed, and cause remanded for a decree of foreclosure for orator against all the defendants as to all the property except that defendant Root have a right to that portion of the property, or the value thereof, not in place in the factory or mill at the time of the execution of the mortgage to the orator, but put in afterwards, — the orator having his election to pay to Root the value of it, or have it excepted in the decree so far as Root is concerned, with liberty to Root to remove it within such reasonable time as the Court of Chancery shall fix for that purpose.¹

¹ Compare: *Walmsley v. Milne*, 7 C. B. n. s. 115; *Porter v. Steel Ass'n*, 122 U. S. 267; *Adams Co. v. Loan Ass'n*, 119 Ala. 97; *Cunningham v. Cureton*, 96 Ga. 489; *Sword v. Lowe*, 122 Ill. 487; *Clary v. Owen*, 15 Gray, 522; *Iron Works v. Walker*, 91

IN RE MARYPORT HEMATITE IRON AND STEEL
COMPANY.

CHANCERY, 1891.

[1892, 1 Ch. 415.]

NORTH, J. (after stating the provisions of the contract of the 2d of July, 1889, continued): —

But for the special provisions of this agreement, the property in the machinery would have passed to the purchasers when it was erected. But there is in the agreement a clear and distinct stipulation that, until it has been paid for, the machinery is to remain the property of the vendors. In my opinion, as between the parties to that agreement, there is nothing in law to prevent that stipulation from taking effect. The Maryport Company had previously executed a mortgage of their colliery to the plaintiffs, and the mortgage deed provided that, not only the existing machinery and chattels, but also all the machinery and chattels to be thereafter brought upon the premises, should be included in the security. That, in my opinion, was a perfectly good bargain as between the parties to it. But I think it was not in the power of the mortgagors to confer on their mortgagees a better title than they themselves had to the property which they agreed to mortgage to them. The Maryport Company (the mortgagors) cannot be heard to say that the machinery in question is not the property of the Luhrig Company, and the banking company (their mortgagees) do not stand in any better position. But it was argued that, so soon as the machinery was fixed upon the premises, the property in it vested in the landlord. I am by no means satisfied that it did, or that, so long as he remained a reversioner, he would have any right of action in respect of the machinery. No doubt, if it had remained upon the demised premises at the end of the term, it would have become the property of the owner in fee of the land, subject to this, that the tenant might have had a right to remove it, so long as he continued in possession of the demised property. I am not satisfied that down to the end of the term the landlord would have had any property in the machinery. But, assuming that he would, still the only claim now made adversely to the Luhrig Company is made by persons who derive title not under the landlord but under the tenant. As regards the landlord, all that I have to take care is that he gets his rent accrued since the winding-up commenced. As the receiver is going to abandon the colliery, I think the Luhrig Company are entitled to remove the machinery which they claim. It was more convenient that the motion

Mich. 409; *Tibbetts v. Horne*, 65 N. H. 242; *Brennan v. Whitaker*, 15 Ohio St. 446; *Hoskins v. Woodward*, 45 Pa. 42; *Footo v. Gooch*, 96 N. C. 265; *Lumber Co. v. Becker*, 96 Wis. 206. — ED.

and the summonses should be heard together; but there will be two separate orders, one upon the motion and the other upon the two summonses.¹

HOLROYD v. MARSHALL.

HOUSE OF LORDS, 1862.

[10 *House of Lords*, 191.²]

THE LORD CHANCELLOR (LORD WESTBURY), after stating the facts of the case, said: My Lords, the question is, whether as to the machinery added and substituted since the date of the mortgage the title of the mortgagees, or that of the judgment creditor, ought to prevail. It is admitted that the judgment creditor has no title as to the machinery originally comprised in the bill of sale; but it is contended that the mortgagees had no specific estate or interest in the future machinery. It is also admitted that if the mortgagees had an equitable estate in the added machinery, the same could not be taken in execution by the judgment creditor.

The question may be easily decided by the application of a few elementary principles long settled in courts of equity. In equity it is not necessary for the alienation of property that there should be a formal deed of conveyance. A contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one of which a court of equity will decree specific performance. In the language of Lord Hardwicke, the vendor becomes a trustee for the vendee; subject, of course, to the contract being one to be specifically performed. And this is true, not only of contracts relating to real estate, but also of contracts relating to personal property, provided that the latter are such as a court of equity would direct to be specifically performed.

A contract for the sale of goods, as, for example, of five hundred chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell five hundred chests of the particular kind of tea which is now in my warehouse in Gloucester, is a contract relating to specific property, and which would be specifically performed. The buyer may maintain a suit in equity for the delivery of a specific chattel when it is

¹ Compare: *Evans v. Kister*, 92 Fed. 832; *Brannon v. Vaughan*, 60 Ark. 87; *Bank v. Elmore*, 52 Ia. 541; *Brakler v. Tooker*, 117 Ind. 176; *Hawkins v. Hersey*, 86 Me. 394; *Crippled v. Morrison*, 13 Mich. 23; *Northwestern Co. v. George*, 77 Minn. 319; *Campbell v. Roddy*, 44 N. J. Eq. 244; *Ford v. Cobb*, 20 N. Y. 344; *Loan Society v. Weber*, 16 Wash. 95; *Hurxthal's Ex'or, v. Hurxthal's Heirs*, 45 W. Va. 584. — Ed.

² Only one opinion is printed. — Ed.

the subject of a contract, and for an injunction (if necessary) to restrain the seller from delivering it to any other person.

The effect in equity of a mere contract as amounting to an alienation, may be illustrated by the law relating to the revocation of wills. If the owner of an estate devises it by will, and afterwards contracts to sell it to a purchaser, but dies before the contract is performed, the will is revoked as to the beneficial or equitable interest in the estate, for the contract converted the testator into a trustee for the purchaser; and, in like manner, if the purchaser dies intestate before performance of the contract, the equitable estate descends to his heir at law, who may require the personal representative to pay the purchase money. But all this depends on the contract being such as a court of equity would decree to be specifically performed.

There can be no doubt, therefore, that if the mortgage deed in the present case had contained nothing but the contract which is involved in the aforesaid covenant of Taylor, the mortgagor, such contract would have amounted to a valid assignment in equity of the whole of the machinery and chattels in question, supposing such machinery and effects to have been in existence and upon the mill at the time of the execution of the deed.

But it is alleged that this is not the effect of the contract, because it relates to machinery not existing at the time, but to be acquired and fixed and placed in the mill at a future time. It is quite true that a deed which professes to convey property which is not in existence at the time is as a conveyance void at law, simply because there is nothing to convey. So in equity a contract which engages to transfer property, which is not in existence, cannot operate as an immediate alienation merely because there is nothing to transfer.

But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a court of equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained.

Apply these familiar principles to the present case; it follows that immediately on the new machinery and effects being fixed or placed in the mill, they became subject to the operation of the contract, and

passed in equity to the mortgagees, to whom Taylor was bound to make a legal conveyance, and for whom he, in the mean time, was a trustee of the property in question.

There is another criterion to prove that the mortgagee acquired an estate or interest in the added machinery as soon as it was brought into the mill. If afterwards the mortgagor had attempted to remove any part of such machinery, except for the purpose of substitution, the mortgagee would have been entitled to an injunction to restrain such removal, and that because of his estate in the specific property. The result is, that the title of the appellants is to be preferred to that of the judgment creditor.¹

ALBERT B. CHICK, EXECUTOR *v.* CHARLES H. NUTE,
ASSIGNEE.

SUPREME COURT, MASSACHUSETTS, 1900.

[176 Mass. 57.]

REPLEVIN of certain personal property, including fixtures. Trial in the Superior Court, before BISHOP, J., who reported the case for the determination of this court, in substance as follows.

On August 11, 1887, Nathaniel P. Nutter, who carried on the business of tailoring in Boston, borrowed \$1,000 of Harrison Chick, his uncle, for which he gave a promissory note, having previously, on August 5th, executed to Chick a bill of sale of the stock of goods, fixtures, and other property in his store. On August 12th, Nutter and Chick entered into a written agreement wherein Nutter agreed to buy at his own cost and keep in stock in his store an amount of goods equal in value to the stock then on hand, to pay the running expenses of the business, and, while the note remained unpaid, to keep at all times a stock of not less than \$1,000 in value, with the understanding that all goods bought by him should be the property of Chick. The judge found that the instruments, though bearing different dates, constituted parts of one transaction; that they were never recorded; that no delivery of the property mentioned in the bill of sale was ever made by Nutter to Chick, but that it remained in the possession of Nutter; and that the goods were all made into garments and sold by Nutter in the

¹ Compare: *Collyer v. Isaacs*, 19 Ch.D. 351; *Coombe v. Carter*, 36 Ch. 348; *Tailby v. Receiver*, 13 D. C. 523; *Pennock v. Coe*, 243 How. 117; *Barnard v. Norwich Co.*, 14 B. R. 469; *Floyd v. Morrow*, 26 Ala. 344; *Apperson v. Moore*, 30 Ark. 56; *Gregg v. Sandford*, 24 Ill. 17; *Scharfenberg v. Bishop*, 35 Ia. 60; *Sawyer v. Long*, 86 Me. 543; *Brady v. Johnson*, 75 Md. 445; *Hudson v. McKale*, 107 Mich. 22; *Ludlum v. Rothchild*, 41 Minn. 218; *Sellers v. Lester*, 48 Miss. 513; *Keating v. Hannankamp*, 100 Mo. 162; *Bank v. Baker*, 57 N. J. Eq. 231; *Collins Ap.*, 107 Pa. 590; *Williams v. Winsor*, 12 R. I. 9; *Parker v. Jacobs*, 14 S. C. 112; *Tedford v. Wilson*, 3 Head, 311; *Braxton v. Bell*, 92 Va. 229; *Peabody v. Landon*, 61 Vt. 318. — ED.

regular course of his business, and other goods were bought by Nutter in his own name to place and keep in his store, and these again were made into garments and sold to customers, and so on; so that at the time of the assignment hereinafter mentioned the goods which Nutter had in the store were not the same as those covered by and described in the bill of sale. The fixtures were the same. On October 23, 1896, Nutter executed to the defendant a common-law assignment of all his property, including the stock of goods, fixtures, &c., then in the store, for the benefit of his creditors.

The judge ruled that no claim was established in favor of the plaintiff in the property replevied except in the fixtures, and as to all other property found for the defendant, and ordered a return to the defendant with damages, but found for the plaintiff in replevin for the fixtures.

If the rulings and findings or either of them were erroneous they were to be set aside, reversed, or modified, and such order entered as the court should determine; otherwise judgment was to be entered upon the findings.

HOLMES, C. J. The bill of sale is shown to have been a mortgage by the agreement made as part of the same transaction. It is plain that if Nutter paid his note Chick was not to keep the goods. The only goods embraced by the instrument which were owned by Nutter at the time, and which are still on hand, are the fixtures. The rest is after acquired property. The instruments were not recorded, and possession was not taken by Chick of any part of the property before the assignment to the defendant and possession taken by him.

The old notion with regard to conveyances or mortgages of after acquired property was that they were simply void. Now such instruments are recognized as contracts, which on the acquisition of the property may operate as conveyances if they sufficiently identify the thing conveyed, and if other necessary conditions are satisfied. *Blanchard v. Cooke*, 144 Mass. 207, 225, 227. The other necessary condition, if they are not recorded, is that possession must be taken before other rights intervene. In this case we need not consider whether such an instrument could be recorded effectively after the chattels to which it applies have been acquired and the instrument begins to operate as a mortgage properly so called. It is settled that recording at an earlier date is not notice, and it may be that recording at the later moment would be equally ineffectual. We express no opinion upon that. If it be true, then the only way in which the mortgagee can make his mortgage valid as against others than the mortgagor is by taking possession. The policy of the law is not to be evaded. In this case he neither recorded nor took possession.

The defendant was not a party to the mortgage. *Bingham v. Jordan*, 1 Allen, 373. It follows that the mortgage was not valid against him even as to the after acquired stock of goods, and, *a fortiori*, as to the fixtures. Probably the ruling of the Superior Court was based on *Wilson v. Esten*, 14 R. I. 621, which construed the assignment as pur-

porting to be subject to the mortgage. We could not adopt a similar construction in the assignment before us. It specifies the goods.

Of course the plaintiff could not sustain his action of replevin on his right as creditor to avoid the conveyance to the defendant. That right he could assert by an attachment, but not by a naked election to declare the conveyance void in the interest of the earlier conveyance to himself, which the law postpones to the defendant's title. The same principle which makes the conveyance and delivery to the defendant good as against the mortgage at the moment when they were made keeps them good as against it. The fact that the later conveyance would give way to a still later attachment does not interfere with its priority over the mortgage.

*Judgment for the defendant.*¹

FUNK v. MERCANTILE TRUST CO.

SUPREME COURT, IOWA, 1893.

[89 Ia. 264.²]

ROBINSON, C. J. In the year 1889 the Crescent Coal Company executed to the intervenor a mortgage to secure the payment of one hundred thousand dollars in bonds. The property so mortgaged included lands in Keokuk County, the coal in the land, together with the right to mine and remove it, the towers, hoisting and pumping machinery and other appurtenances of the mines in the mortgaged premises, and personal property used in connection with the mines. The mortgage also included all right and title of the coal company "to all money and credits due, or to become due to it, and all the contracts and agreements made or to be made, and all and singular any property that may be acquired in the future by the party of the first part, and all and singular the entire property of the party of the first part, both real and personal, wherever found, together with the rights, privileges and appurtenances belonging or in any wise appertaining to the said land and coal, . . . together with all its corporate rights, privileges, immunities and franchises now held or hereafter to be acquired, with the reversion and reversions, remainder and remainders, income and royalties, rents, issues, and profits thereof, and all the estate, right, title and interest, property, possession, claim and demand whatsoever, as well in law as in equity, present or in future, of the party of the first part of, in, and to, all and singular the property and effects hereinbefore described, and every part of the same, and every parcel thereof,

¹ Compare: *Loth v. McCarthy*, 85 Ky. 591; *Chase v. Denny*, 130 Mass. 566; *Rochester Co. v. Rasey*, 142 N. Y. 570; *Transit Co. v. Ryan*, 54 Ohio St. 307; *Phelps v. Murray*, 2 Tenn. Ch. 746; *Merchants' Bank v. Lovejoy*, 84 Wis. 601. — Ed.

² Only one point is printed.

with the appurtenances, and all revenues, benefits and advantages and profits to the party of the first part at any time accruing from or out of the same, or the business operations thereof, to have and to hold the same," &c. The mortgage also provided for the taking possession of the mortgaged property. On the twenty-fifth day of March, 1891, the intervenor obtained in the District Court of Keokuk County a decree for one hundred and seven thousand and fourteen dollars and thirty-seven cents, due on the bonds, foreclosing the mortgage, and ordering the sale of the mortgaged property. The decree followed the mortgage in all respects, and gave to the intervenor the right to the possession of all the mortgaged property until the amount adjudged to be due should be paid, or until the right of possession should pass to a purchaser. On the twentieth day of April, 1891, an execution was issued, under which so much of the mortgaged property as could be found was sold. The execution was returned August 1, 1891, satisfied only in part, more than sixty thousand dollars remaining unpaid. On the fifteenth day of April, 1891, a judgment was rendered by the District Court of Keokuk County in favor of the plaintiff, and against the coal company, for the sum of one thousand and thirty-three dollars and thirty-seven cents and costs. On the eighteenth day of the same month an execution was issued on the judgment so obtained, under which the Chicago & Northwestern Railway Company and the Burlington, Cedar Rapids & Northern Railway Company were garnished, and the plaintiffs claim that by means of that garnishment they became entitled to the payment of their judgment from the money owed by the garnishees to the defendant. It appears that the money so owed was due for coal which the coal company had mined from the mortgaged land, and furnished to the garnishees, between the thirty-first day of March and the nineteenth day of April, 1891. The intervenor contends that the money owed by the garnishees was income, issues and profits accruing from and out of the mortgaged property, and from the business operations of the company, and was included in the mortgage, and that the plaintiffs, their attorneys, and the sheriff had actual notice of the mortgage on the money in the hands of the garnishees before they were garnished. The plaintiffs admit that they and their attorneys and the sheriff knew the contents of the mortgage, but deny that they had actual notice of the mortgage on the debts in question at the time of the garnishment.

It is claimed by the appellees that the mortgage did not include such debts, for the reason that the description is not sufficiently specific and definite. In *Sandwich Manufacturing Co. v. Robinson*, 83 Iowa, 567, 568, it was held that a valid mortgage on a claim for money not earned, as on accounts for work to be done, may be given. We know of no reason why such a mortgage may not also be given upon the income, issues and profits of the business of mining and selling coal, and upon accounts which may accrue from it. It may be true that the description in the mortgage in question is too indefinite and uncertain,

as to some of the property and property rights sought to be included, to be effectual; but, if that be so, it would not affect the right of intervenor to any property sufficiently described. The debts which the garnishee owed the defendant were for coal on which intervenor had a mortgage, and were income and issues of the defendant which accrued from its business operations. The plaintiffs knew the contents of the mortgage, and must be charged with knowledge of the fact which the relation of the garnishees with the defendant necessarily suggested, and which an inquiry would have disclosed with certainty, that the debts garnished grew out of the business of the defendant, and were included in the mortgage. We conclude that the mortgage was valid as against the plaintiffs.¹

HANNIBAL HAMLIN AND OTHER TRUSTEES v. EUROPEAN AND
NORTH AMERICAN RAILWAY CO. AND OTHERS.

SUPREME COURT OF MAINE, 1881.

[72 Me. 83.]

BILLS IN EQUITY, heard upon bills, answers and proofs.

The first is a bill brought by the trustees of the bondholders of the European and North American Railway Company against the company, and certain creditors (E. R. Burpee, F. A. Wilson and James W. Emery) of the consolidated company, who had levied upon lands of the company, purchased or contracted for subsequent to the mortgage to the trustees, and called the Crosby lot in Hampden, and the Hinckley lot, Lord lot, and Lord and Veazie lot in Bangor, to restrain the defendants from disputing the title and possession of the trustees to such lots, &c.

SYMONDS, J. The three parcels of real estate in Bangor referred to as the Hinckley, Lord, and Lord and Veazie lots, the European and North American Railway Company, in the fall of 1870, contracted in writing to purchase. Possession was then taken by the corporation, and has been retained by those in charge of the railroad from that time to the present. The payments required by the contracts were made by that company, and afterwards by the consolidated company, and by the trustees under each mortgage during the period of their possession.

¹ Compare : *Investment Co. v. Manila Ry.*, 1897 A. C. 81; *United States Trust Co. v. Wabash R. R.*, 150 U. S. 287; *Harris v. Youngstown Bridge Co.*, 90 Fed. 332; *M. V. R. R. v. U. S. Express Co.*, 8 Ill. 535; *Smith v. Eastern R. R.*, 124 Mass. 154; *De Gaff v. Thompson*, 24 Minn. 452; *Emerson v. N. A. R. R.*, 67 Me. 387; *Williamson v. N. J. Southern Co.*, 28 N. J. Eq. 277; *Clay v. East. Tenn. R. R.*, 6 Heisk. 421; *Gilbert v. Washington R. R.*, 33 Gratt. 645. — ED.

The premises have been used and improved at considerable expense for depot-grounds; the principal improvements having been made before consolidation.

The course of reasoning employed in the previous case, *Hamlin et al. Trustees v. Jerrard*, leads directly to the conclusion, that the mortgage to the complainants in the first of these bills in equity, as trustees, operated upon the inchoate right of the Maine company to a conveyance of these lots under the contracts, as soon as they were executed and that company was in possession under them for the purposes of the charter. Their right to a conveyance became at once subject in equity to the mortgage. The mortgagees, upon possession taken, were subrogated to the rights of the mortgagors. By our statute such a right to the conveyance of lands may be taken and sold on execution. Rev. Stat. c. 76, § 29. Such a mortgage may apply to it as well. At the date of a mortgage like this, given to obtain funds to complete construction, the corporation might be in possession of considerable portions of its road-bed under similar contracts to purchase; or it might subsequently acquire title to parts of its line in that way, instead of pursuing the statutory method. In either case, such after-acquired property, when in pursuance and upon performance of the contract the full title to it vests in the corporation, becomes part of a mortgaged estate. Any intermediate interest or right gained, is equally subject to the mortgage. The manner of acquiring the right of way, or depot-grounds, cannot be important. It is upon the right acquired that the mortgage acts. Possession of lands under such circumstances and for such purposes, with the right on certain terms to perfect the title, may be as valuable an incident to the railroad itself, as necessary a part of it, as any leasehold interest or higher estate it may have in another part of its line. See *Barnard v. Norwich and Worcester Railroad, supra*, where an after-acquired leasehold interest was held to pass to the trustees under the mortgage.

Nor do we think a different rule applies, as to the payments made by the consolidated company upon these contracts during the period of its possession. Such payments stand upon the same footing as improvements made by that company upon the buildings and grounds. Its position, in reference to the plaintiffs as trustees and to the mortgaged property, is in some respects more truly defined by saying that it is its predecessor in title under a new name (and something more), than by regarding it merely as the assignee of the original company. It took the entire property, subject to encumbrances, and assuming the debts. Five millions of the consolidated bonds were to be used only to redeem and pay the first mortgage claims. If the exchange of bonds had been completed, the whole consolidated property, with all future additions, would still have been encumbered by substantially the same debt as that secured by the plaintiffs' mortgage, under a new form, and in its own name. If, at the date of consolidation, the Maine company had obtained a clear title to the depot grounds in Bangor, but

was in debt for them, had received the deed, but had not paid the purchase-money, it is clear that the grounds would have been subject to the plaintiffs' mortgage, while the debt would have been one the consolidated company must pay. Or, if there had been a mortgage on the same real estate when the Maine company received its deed, supposing for the sake of illustration the deed to have been delivered and under such circumstances, and consolidated funds had paid it, the payment would have been of a debt it was the duty of that company to pay, that mortgage would have been discharged, and the plaintiffs' mortgage would have become the first encumbrance upon the land. The mortgage to the plaintiffs attached to the right to a deed of the station-grounds as a part of the road itself, and it continued to attach to it as the right grew in value. The consolidated company, under the articles of union, was not an assignee of these contracts, discharged from the mortgage. The increased value of the right to a conveyance of real estate, which was in the occupation of the company and essential to the road, remained subject to the mortgage as an accession to the road, just as the increase of values along any part of the line, arising from improvements made by the consolidated company in its road-bed, track, or stations, added to the security of the first mortgage bondholders. If the consolidated company, taking the entire property of its predecessor in Maine, subject to mortgage, increased the value of the railroad, and the rights that go with it, by making payments or expending money, that gives it no equitable interest as against the mortgagees. If, at the consolidation, the title of the Maine company to a part of its road-way or yards was imperfect, and payments by the consolidated company perfected it, the mortgage holds the completed title. In regard to these three contracts for the real estate at the station in Bangor, it should be observed, also, that the interest in them which passed to the consolidated company at the consolidation, not only was subject to the mortgage in the sense already indicated, but it was also in its essence, a right, and nothing more, to acquire a thing, which, when acquired, as to these plaintiffs, was a part of the road mortgaged to them.

It is not doubted that an interest in these contracts passed to the consolidated company by the terms of the articles of union. It would be to that company that the conveyances should be made, when the terms were fulfilled on which the contractors were obliged to give the deeds, unless a legal foreclosure of the plaintiffs' mortgage had changed their interest as mortgagees into an absolute title. But a conveyance to the consolidated company, prior to foreclosure, would inure to the benefit of the plaintiffs, to the extent of their mortgage.

The complainants in the first bill are entitled to an injunction against all the respondents named therein and in the amendment, restraining them from any interference with the complainants' possession and control, as mortgagees, of the real estate therein described, and from any resistance of the complainants' title to the same to the extent of the trusts declared in the mortgage; the injunction to be made perpetual

and without the limitation just stated, if the interest and title of the complainants has or shall become absolute by a legal foreclosure. The second bill is dismissed. *Decree accordingly.*¹

FOSDICK v. SCHALL.

SUPREME COURT, UNITED STATES, 1878.

[99 *United States*, 235.]

SCHALL leased cars to the Chicago, Danville, and Vincennes Railroad. Subsequently Fosdick and Fish, as trustees of a mortgage of the railroad to secure bonds, filed a bill for foreclosure of the mortgage. A receiver was appointed and the road operated for some time. During this time Schall was paid an agreed rental by the receiver under direction of the court. The railroad was subsequently sold under decree of court and the cars returned to Schall. He then filed a petition praying that he be paid rental for a period prior to the appointment of the receiver, during which he had not been paid any rental. The Circuit Court for the Northern District of Illinois allowed this claim, directing the payment of \$14,568.75 to Schall. It did not appear from the record that there were any funds in court to the credit of the cause except such as arose from the sale of the mortgaged property. Fosdick and Fish and certain bondholders appealed from this order.

MR. CHIEF JUSTICE WAITE. We have no doubt that when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court in the exercise of a sound judicial discretion may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable. Railroad mortgagees and the rights of railroad mortgagees are comparatively new in the history of judicial proceedings. They are peculiar in their character and affect peculiar interests. The amounts involved are generally large, and the rights of the parties oftentimes complicated and conflicting. It rarely happens that a foreclosure is carried through to the end without some concessions by some parties from their strict legal rights, in order to secure advantages that could not otherwise be attained, and which it is supposed

¹ Compare: *Toledo R. R. v. Hamilton*, 134 Vt. 296; *Branch v. Gulf R. R.*, 3 Woods, 481; *Brooks v. Vermont Central R. R.*, 22 Fed. 211; *Newgass v. Atlantic R. R.*, 56 Fed. 676; *Crompton v. Jessop*, 68 Fed. 263; *Morton v. New Orleans R. R.*, 79 Ala. 590; *Coe v. L & W. R. R.*, 34 N. J. Eq. 266; *Pierce v. Emery*, 32 N. H. 484; *Philadelphia R. R. v. Love*, 125 Pa. 488; *Poland v. Valley R. R.*, 52 Vt. 144. — Ed.

² This case is abridged — Ed.

will operate for the general good of all who are interested. This results almost as a matter of necessity from the peculiar circumstances which surround such litigation.

The business of all railroad companies is done to a greater or less extent on credit. This credit is longer or shorter, as the necessities of the case require; and when companies become pecuniarily embarrassed, it frequently happens that debts for labor, supplies, equipment, and improvements are permitted to accumulate, in order that bonded interest may be paid and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom in equity they belong, and used to pay the mortgage debt. The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If for the convenience of the moment something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do. For even though the mortgage may in terms give a lien upon the profits and income, until possession of the mortgaged premises is actually taken or something equivalent done, the whole earnings belong to the company and are subject to its control. *Galveston Railroad v. Cowdrey*, 11 Wall. 459; *Gilman et al. v. Illinois & Mississippi Telegraph Co.*, 91 U. S. 603; *American Bridge Co. v. Heidelbach*, 94 id. 798.

The mortgagee has his strict rights which he may enforce in the ordinary way. If he asks no favors, he need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion; and the Chancellor should so mould his order that while favoring one, injustice is not done to another. If this cannot be accomplished, the application should ordinarily be denied.

We think, also, that if no such order is made when the receiver is

appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipment provided, or lasting and valuable improvements made out of earnings which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business. This, not because the creditors to whom such debts are due have in law a lien upon the mortgaged property or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. While, ordinarily, this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way. Thus it often happens that, in the course of the administration of the cause, the court is called upon to take income which would otherwise be applied to the payment of old debts for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipment. In this way the value of the mortgaged property is not unfrequently materially increased. It is not to be supposed that any such use of the income will be directed by the court, without giving the parties in interest an opportunity to be heard against it. Generally, as we know both from observation and experience, all such orders are made at the request of the parties or with their consent. Under such circumstances, it is easy to see that there may sometimes be a propriety in paying back to the income from the proceeds of the sale what is thus again diverted from the current debt fund in order to increase the value of the property sold. The same may sometimes be true in respect to expenditures before the receivership. No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must to a greater or less extent influence the Chancellor when he comes to act. The power rests upon the fact that, in the administration of the affairs of the company, the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that if there has been in reality no diversion, there can be no restoration; and that the amount of restoration should be made to depend upon the amount of the diversion. If in the exercise of this power errors are committed, they, like others, are open to correction

on appeal. All depends upon a proper application of well-settled rules of equity jurisprudence to the facts of the case, as established by the evidence.

In this case no special conditions were attached to the order appointing a receiver in the Circuit Court of the United States; and it is not contended that the intervenor has brought himself within the rule fixed by the State court, in respect to the payment of general creditors. He asks to be paid a rent for his cars; but he entered into no express contract with the company which requires such a payment, and there is nowhere to be found any proof of an implied obligation to make such compensation. Two years and more before the appointment of a receiver by the State court, he contracted to sell his cars to the company at an agreed price, payable in instalments, secured by what was in legal effect a paramount lien upon the cars. Payments were made according to the contract until October, 1874, when they stopped. The cars remained in use after that, not under a new contract of lease, but under the old contract of sale. The price agreed upon not having been paid in full, the power of reclamation, which was reserved, has been exercised and sustained. The cars were not included in what was sold at the foreclosure sale, and consequently have contributed nothing directly to the fund now in court for distribution. So far as appears, no moneys growing out of the receivership remain to be applied on the bonded debt; and, if there did, through the rent already paid by receiver Anderson, full compensation has been made for all additions to that fund by means of the use of the cars. There is nothing to show that the current income of the receivership or of the company has been in any manner employed so as to deprive this creditor of any of his equitable rights. In short, as the case stands, no equitable claim whatever has been established upon the fund in court. *Prima facie* that fund belongs to the mortgage creditors, and the presumption which thus arises has not been overcome. Schall, for the balance, his due, after his own security has been exhausted, occupies the position of a general creditor only.¹

¹ Compare: *Huidekoper v. Locomotive Works*, 99 U. S. 258; *Hale v. Frost*, 99 U. S. 389; *Miltenberger v. Railway Co.*, 106 U. S. 286; *Trust Co. v. Souther*, 107 U. S. 591; *Burnham v. Bowen*, 111 U. S. 776; *Union Trust Co. v. Illinois Railway Co.*, 117 U. S. 434; *Union Trust Co. v. Manning*, 125 U. S. 591; *St. Louis, &c. Railroad v. Cleveland, &c. Railway*, 125 U. S. 658; *Kneeland v. American L. & T. Co.*, 136 U. S. 89; *Railroad Co. v. Wilson*, 138 U. S. 501; *Thomas v. Western Car Co.*, 149 U. S. 95; *Virginia, &c. Coal Co. v. Central Railroad Co.*, 170 U. S. 355; *Southern Railway Co. v. Carnegie Steel Co.*, 176 U. S. 257; *International Trust Co. v. T. B. Townsend Co.*, 95 Fed. Rep. 850 (C. C. A.); *First Nat. Bank v. Ewing*, 103 Fed. Rep. 168. — SMITH: CASES ON CORPORATIONS, 1197 n.

THE INDOMITABLE.

ADMIRALTY, 1859.

[Swabey, 446.]

THIS was a cause of bottomry, opposed by the mortgagee of the ship in possession.

On the 1st of April DR. LUSHINGTON gave judgment as follows: — I have delayed my judgment in this cause solely from a wish that the party against whom the judgment will be given should be satisfied that mature consideration had been given to the case. From the time I perused the papers I had no doubt upon the material question of fact on which the decision of the court will turn. The principles upon which the court must proceed are acknowledged upon all hands; and the application of those principles to the facts of the case appeared and do appear to me equally clear.

There is one rule established by all authorities: that this court has no jurisdiction to enforce any bond or obligation entered into by the master of a vessel unless it be a bottomry bond, of which maritime risk is an ingredient essential to its vitality.

On the 11th of October, 1858, an action of bottomry was entered against this ship on behalf of Messrs Binny & Co., of Madras, and an appearance was given by the mortgagees in possession.

The history of the ship is as follows: — She was originally the property of the Australian Auxiliary Steam Clipper Company; but on the 15th of August, 1857, was mortgaged to the present mortgagees in possession. On the 12th of September, 1857, she sailed for Madras with troops and a cargo. On her outward voyage the master, at the Cape de Verd Islands, purchased fuel to the amount of £471, for which he drew a bill upon his owners. This bill was dishonored and forwarded to Messrs. Parry & Co., of Madras, for realization. On the 23d of February, 1858, the vessel reached Madras, when payment of the dishonored bill was demanded of the master, and legal proceedings threatened. It is not necessary for me to recite in detail the proceedings at Madras, nor the circumstances attendant upon the dealing with the outward freight. They might be very material if the court was in a position to entertain the consideration of them. I shall advert only to what I deem pertinent to my decision. The master, being without money or credit (I assume these averments to be true), applied to Messrs. Binny & Co. for an advance of money to pay the dishonored bill and to enable him to commence a fresh voyage. I assume, again, that the master was so circumstanced (though I give no opinion upon it), that he might have granted a valid bottomry bond. Messrs. Binny & Co. advanced 14,710 rupees to pay off the bill and to cover the disbursements of the ship at Madras and the outfit for a voyage to Calcutta; and they did so under an agreement which is alleged to be a

bottomry bond. And here, though I do not mean to rely upon the fact as guiding my judgment, I deem it right to observe that this ship was peculiarly circumstanced; she was, and the fact must have been known to the master, mortgaged at the time she left England.

I now come to the consideration of the agreement which is said to be a bottomry bond, capable of being enforced in this court. This agreement is dated 22d of March, 1858, and appears to be an agreement between the master and Messrs. Binny & Co. It begins by reciting all the facts I have already mentioned, including the advance of money by Messrs. Binny & Co., and then states stipulations, or, as they are called, conditions, to be performed on the part of the master. 1st. That the vessel shall be consigned to Messrs. Jardine & Co., of Calcutta. 2d. That the master shall draw a bill upon them in favor of Binny & Co. for 15,000 rupees, payable at thirty days' sight. 3d. That the master shall repay to Messrs. Binney & Co., or their agents, all such moneys paid or disbursed by them, by way of premiums, for effecting insurance on the ship from Madras to Calcutta, and until the ship shall take her departure from Calcutta on some outward voyage, with interest at 9 per cent up to the time of repayment. This stipulation or condition introduces the consideration of the main question, namely, whether this bond or agreement contains any sea risk. 4th. That the master shall hypothecate the ship for the due payment of the bill of exchange for 15,000 rupees, and of the other sums and interest aforesaid.

There can be no doubt as to the law. There must be a maritime risk in the instrument; it matters not in what form of words. Then the question is, whether I can extract from these conditions any expressed intention of the parties that they purported to agree that there should be a maritime risk. Now, first, it is quite clear that there is no maritime risk directly stated. Secondly, I agree that if there were a maritime risk directly stated, the mere fact that the insurance was to be made by the lenders and paid for by the borrowers might not invalidate the bond. There is one case to that effect, I doubt if there be more, and there the circumstances were most peculiar. I refer to the case of the *Nelson*; the objection was taken there, but was not noticed in the judgment. Thirdly, the insurance is not limited to the arrival of the ship at Calcutta, but is continued until the ship leaves Calcutta. This stipulation appears to me to negative all maritime risk on the voyage from Madras to Calcutta, and to show clearly that the parties contemplated a transaction of a different description. This construction is confirmed by the rate of interest, which is the common rate of interest, as I believe, in that part of the world, and not according to the rate where maritime risk is run; and, moreover, the interest is to be continued until payment. The intention, and so, I think, the true interpretation of this instrument, is to mortgage the ship for principal, ordinary interest and insurance, without any sea risk at all. It is clear that the Court of Admiralty has no cognizance over such a transaction.

This instrument then states the actual advance by Binny & Co., and the drawing of the bill of exchange for 15,000 rupees on Jardine & Co. at thirty days' sight; and then states the agreement of the master, that within thirty-four days after the arrival of the ship at Calcutta he will pay the bill for 15,000 rupees and all interest, and perform the other conditions already recited. But not a word is said of maritime interest or maritime risk. True it is that in some cases the undertaking to pay at a certain time after the arrival of a ship at a port of destination may show an intention to include a maritime risk; but the court must look at the whole instrument, and form its conclusion from a consideration of all its contents. I might add, that there is not the least intimation here that the bill of exchange was given as a collateral security.

It is not necessary to travel further into the particulars of this case. I found my judgment on the instrument itself, but I am of opinion that there are other difficulties, though I abstain from noticing them with any minuteness. For instance, that no proceedings on this bond were had at Calcutta; indeed there could hardly have been any, as the bond specifies a further voyage. All this negatives a maritime risk between Madras and Calcutta. It has not been contended that the maritime risk extended to the whole voyage. Indeed another and a different security was, by the indenture of the 18th of May, 1858, taken for this sum of 15,000 rupees, which again shows that the money was not due on bottomry at Madras.

I pronounce against the bond.¹

¹ Compare: *Buck v. Travon*, 4 East. 319; *The Nelson*, 1 Hagg. 169; *The Emancipation*, 1 Rob. 124; *The Bjorn*, 10 Prob. D. 44; *The Elpis*, L. R. 4 Ad. 1; *The William*, Bl. & How. 66; *The Eureka*, 2 Low. 417; *The Archer*, 15 Fed. 276; *The Atlantic*, Newb. 514; *The Willhelminie*, 58 Fed. 890; *The Albion*, 10 Ben. 668; *The Lane*, 1 Low. 358; *Greeley v. Waterhouse*, 19 Me. 9. — AMES: CASES ON ADMIRALTY, 211 n.

SECTION II. — THE OBLIGATION.

TOLMES v. CHANDLER.

KING'S BENCH, 1678.

[2 *Levinz*, 116.]

DEBT upon an Obligation conditioned to perform all Covenants and Conditions, in an Indenture of Mortgage, where there was a Proviso, that if the Mortgagor pay the Money at the Day, that the Mortgage should be void; and for Breach assigns the Non-payment of the Money at the Day: Hereupon the Defendant demurred; and for the Defendant it was objected, That this was no Forfeiture of the Bond, but of the Estate, and that this Condition is annexed to the Estate for the Benefit of the Mortgager, in order to have his Estate again upon Payment of the Money, but not to oblige him to pay the Money. Of this Opinion was Hale, but Twysden *contra*, and he cited the case of Westbrook, Hill. 22 Car. 1. B. R. Rot. 116, to be so adjudged: upon which it was adjourned; and after another Day he brought the Record of that Case into Court; whereupon Hale changing his Opinion, gave Judgment for the Plaintiff. See 2 Cro. 281, and Yelv. 206, the like Case and the like Judgment.¹

COOK v. BARTHOLOMEW.

SUPREME COURT, CONNECTICUT, 1891.

[60 *Conn.* 24.]

CARPENTER, J. This is a suit for the foreclosure of a mortgage, with the alleged mortgage annexed as an exhibit. The mortgage is in two parts—an ordinary deed for the consideration of \$900, duly executed to convey real estate, and a condition thereto attached, of the same date, and signed by the grantor, as follows: “The condition of the within deed is as follows: The said Bostwick, for the consideration named in the within deed, covenants and agrees with said Charles Cook as such conservator, that he will receive said Sarah A. Bostwick into his care and keeping during the term of her

¹ Compare: *King v. King*, 3 P. Wms. 358; *Lee v. Rook*, Moseley, 318; *Pearson v. Hyland*, 22 U. B. 202; *Bray v. Comer*, 82 Ala. 183; *Van Orden v. Dunham*, 35 Cal. 136; *Hall v. Davis*, 73 Ga. 101; *Haedenuam v. Woodward*, 22 Kans. 734; *Blunie v. Segras*, 29 La. Ann. 291; *Parker v. Barker*, 2 Met. 423; *Mizner v. Russell*, 29 Mich. 229; *Hopkins v. Ensign*, 122 N. Y. 144; *Bucklin v. Bucklin*, 1 Abb. 242; *Hodgson v. Shannon*, 44 N. H. 572; *Moses v. Hatfield*, 27 S. C. 324; *Cawley v. Kelley*, 60 Wis. 315. — Ed.

natural life, that he will provide for all her wants in a reasonable and proper way, will provide her with all needed food, drink and clothing, have a room and fire when needed, lodging and every necessary comfort, both in sickness and health, and at her decease give her decent and proper burial, and erect tombstones at her grave, with a suitable inscription thereon, within one year after her decease, said tombstones to be of a value of not less than fourteen dollars. Now, therefore, if said Bostwick shall well and truly perform all and every of the above covenants and stipulations faithfully, then this deed to be void, otherwise to remain in full force and effect in law."

The complainant also alleges that the defendant Bostwick subsequently conveyed his interest in the premises to the defendant Jones, and that Jones conveyed his interest to the other defendant, Bartholomew. The defendants demurred, and the case is reserved.

Whether the instrument sued on is or is not a mortgage is the principal question in the case. What is a mortgage? "A mortgage is a contract of sale executed, with power to redeem. . . . The condition of a mortgage may be the payment of a debt, the indemnity of a surety, or the doing or not doing any other act. The most common method is to insert the condition in the deed, but it may as well be done by a separate instrument of defeasance executed at the same time. . . . A bond or note is usually taken for the debt, which is described in the deed, with a condition that if the debt is paid by the time the deed shall be void. In such case the mortgage is called a collateral security for the debt. In like manner an engagement to indemnify, or any other agreement, may be described in the mortgage deed." 2 Swift's Digest, 182, 183. "To constitute a mortgage the conveyance must be made to secure the payment of a debt." Bacon v. Brown, 19 Conn. 29. "A conveyance of lands by a debtor to a creditor as a security for the payment of the debt." Jarvis v. Woodruff, 22 Conn. 548.

What is a debt? "That which is due from one person to another, whether money, goods or services; that which one person is bound to pay to another or to perform for his benefit; that of which payment is liable to be exacted; due; obligation; liability." Webster's Dictionary.

What is this case? Ammon Bostwick received \$900 from the plaintiff, in consideration of which he agreed to support Sarah A. Bostwick during life, and at her death to bury her and to erect a tombstone to her memory. To secure the performance of this agreement he executed this deed, with a condition that the deed should be void if the agreement should be performed. He assumed a duty which may be aptly described as a debt. He executed a deed of real estate as collateral security for the performance of that duty — the payment of that debt. The obligation falls within an approved definition of debt, and the conveyance is within the legal definition of a mortgage.

There is no force in the objection that this cannot be a mortgage

because of the difficulty in ascertaining the amount of the debt, as clearly appears by the definitions. Of course there is less certainty and more inconvenience in reducing an obligation of this nature to a money valuation than there is in computing the amount due on an ordinary bond or note. Nevertheless it may be approximately done; and that is sufficient for all the purposes of substantial justice. Courts never refuse to redress an injury on account of the difficulty in estimating the extent of the injury in dollars and cents.

In this case the age, health, general condition and expectation of life of Sarah A. Bostwick must be known; add to these the probable cost of supporting her for one year, and we have the data for a reasonable estimate of the cost of supporting her through life. It is a problem of the same nature, containing the same elements and similar factors, with the problem which the parties solved fourteen years ago. They then, as it seems, fixed the outside limit at \$900. The same thing can be done now as well as then. Possibly \$900 may be considered an equitable limit beyond which the plaintiff may not claim in this case. As other circumstances may exist which will materially affect the general question, we will not consider the question further on this demurrer.

Regarding the conveyance as a mortgage, as we do, there is no foundation for the claim that an entry for a breach of the condition is essential. An entry is essential when the grantor would divest the grantee of his title for a breach of a condition. This is an action by the grantee, in whom the title is, not to enforce a forfeiture, but to foreclose an equity of redemption, unless the grantor, within a reasonable time allowed him therefor, pays the damage sustained by a breach of his agreement.

The Court of Common Pleas is advised to overrule the demurrer.

In this opinion the other judges concurred.¹

BROWN v. COLE.

CHANCERY, 1845.

[14 *Simm.* 427.]

BILL to redeem a mortgage for a term of years, made on the 1st of April, 1844.

The proviso for redemption stipulated that the mortgagee should re-

¹ Compare: *Furbish v. Sears*, 2 Cliff. 454; *Hill v. Hellon*, 80 Ala. 528; *Marchette v. Wanless*, 1 Col. 225; *McConnell v. Dixon*, 43 Ill. 99; *Brooks v. Lester*, 36 Md. 65; *Hollis v. Hollis*, 84 Me. 96; *Taft v. Stoddard*, 142 Mass. 545; *Abele v. McGuigan*, 78 Mich. 475; *Bender v. Zimmermann*, 122 Mo. 194; *King v. Exchange*, 5 N. Y. 547; *Bethlehem v. Hunis*, 40 N. H. 34; *Peterson v. Johnson*, 7 Ohio, 225; *Soper v. Guernsey*, 71 Pa. St. 219; *Austin v. Austin*, 9 Vt. 257; *Simpson v. Edmunston*, 23 W. Va. 675. — ED.

assign the mortgaged premises, on being repaid the money lent, on the 1st of April, 1845, with interest in the meantime, by quarterly payments.

The mortgagor, having had an advantageous offer, for the purchase of the premises shortly after the mortgage was made, tendered, to the mortgagee, the amount of the principal, and of the interest up to the 1st of April, 1845, together with a re-assignment of the mortgaged premises; but the mortgagee would neither accept the money nor execute the deed: in consequence of which the bill was filed.

The defendant demurred to the bill for want of equity.

The VICE CHANCELLOR allowed the demurrer, on the ground that it was contrary to the practice of the court to decree the redemption of a mortgage, before the day appointed for that purpose had arrived.¹

BUNKER v. BARRON.

SUPREME COURT, MAINE, 1887.

[79 Me. 62.²]

WRIT OF ENTRY, the facts are stated in the opinion of the court.

FOSTER, J. The plaintiff claims that the deed of January 7, 1868, to Paine and the bond back to the same parties constituted a mortgage of the premises, and that the subsequent transactions of February 1, 1875, between William Quint and Paine, extinguished the mortgage, thereby letting in the plaintiff's title upon which he bases this action to recover possession of the premises.

In view of these facts and circumstances together with the evidence before us, it is impossible to arrive at any other conclusion than that it was the intention of the parties by their transactions of February 1, 1875, to leave the former security unaffected, and that the note was not intended as payment of the debt due at that time. There was a change in the form of the debt, but there was no actual payment of it. That is not enough to affect the mortgage. Nothing but payment of the debt or its release will discharge a mortgage. Crosby v. Chase, 17 Maine, 369; Parkhurst v. Cummings, 56 Maine, 159; Ladd v. Wiggin, 35 N. H. 426. "The mortgage remains a lien until the debt it was given to secure is satisfied, and is not affected by a change of the note, or by giving a different instrument as evidence of the debt." Jones on Mort. § 924; Pomroy v. Rice, 16 Pick. 24.

¹ Compare: Burrows v. Molloy, 2 J. & L. 521; Borill v. Endle, 1896, 1 Ch. 648; Abbe v. Goodwin, 7 Conn. 377; Herinberger v. Boyd, 18 Ind. 420; Struchfield v. Milliken, 71 Me. 567; Pomeroy v. Winship, 12 Mass. 514; Le John St., 19 Wend. 659; Kaescheur v. Upton, 6 Dak. 449; Moore v. Cord, 14 Wis. 213. — ED.

² Only one point is printed. — ED.

Paine's interest passed and became vested in William Barron, who is in possession, as the evidence discloses, by his agent or servant — the defendant in this suit. The rights of the defendant are the same, therefore, as those of the person whom he represents by that possession. This action could not be maintained by the mortgagor against the mortgagee or his assignee in possession without showing a satisfaction of the mortgage. Neither can it be maintained by the grantee of the mortgagor. *Woods v. Woods*, 66 Maine, 206; *Jewett v. Hamlin*, 68 Maine, 172; *Rowell v. Jewett*, 71 Maine, 409.

*Judgment for the defendant.*¹

PETERS, C. J., DANFORTH, VIRGIN, LIBBEY, and HASKELL, JJ., concurred.

VAN SYCKEL v. O'HEARN.

CHANCERY, NEW JERSEY, 1892.

[50 N. J. Eq. 173.]

BIRD, V. C. The complainants in this case filed their bill to foreclose a mortgage which was held by the testator, in his lifetime, on lands in the bill described. The bond which the mortgage was given to secure had been due for many years. The bill was filed on the twenty-fifth day of November, 1891. In the month of March, 1891, the then owner of the premises entered into negotiations with Patrick O'Hearn, one of the defendants, for the sale to him of the said premises. O'Hearn was willing to purchase the premises, provided the testator, who was then living, would not require the payment of the mortgage which he then held for one year from the 1st of April then next ensuing. Both parties to the said negotiations requested Mr. Wyckoff, a counsellor at law and intimately acquainted with the testator, to procure the consent of the testator that the time for payment of his mortgage should be extended for one year from the 1st of April, 1891. He did procure such consent. Thereupon the negotiations for the sale and purchase of the premises were carried through.

There being no doubt as to the amount of money actually due upon the bond which the mortgage was given to secure, the only question is whether the complainants had a right to commence their suit to foreclose said mortgage before the expiration of the one year from the first day of April, 1891. The complainants say that the obligation being in writing and under seal the time for the performance thereof can-

¹ Compare: *Helruetag v. Frank*, 61 Ala. 67; *Olyphant v. Eckerley*, 36 Ark. 69; *Bolles v. Chauncy*, 8 Conn. 389; *Bank v. Dayton*, 116 Ill. 257; *Powder v. Ritzinger*, 102 Ind. 571; *Foster v. Paine*, 63 Ia. 85; *Machine Co. v. Brock*, 113 Mass. 196; *Hill v. Beebe*, 13 N. Y. 563; *Bristol v. Pearson*, 107 N. C. 562; *Seymour v. Darrow*, 31 Vt. 122. — Ed.

not be enlarged by a parol agreement. I think all of the authorities, in this State at least, hold the time for performance of every such contract may be extended by parol. *Bigelow v. Rommelt*, 9 C. E. Gr. 115; *Tomkins v. Tomkins*, 6 C. E. Gr. 338; *Maryott v. Renton*, 6 C. E. Gr. 381; *Cox v. Bennett*, 1 Gr. 165; *Van Houten v. McCarty*, 3 Gr. Ch. 148; *Stryker v. Vanderbilt*, 1 Dutch. 482; *Bell v. Romaine*, 3 Stew. Eq. 28; *Sharp v. Wyckoff*, 12 Stew. Eq. 376; *Measurall v. Pearce*, 4 Atl. Rep. 678; *King v. Morford*, Sax. 274; *Stoutenburgh v. Tomkins*, 1 Stock. 332; *Baldwin v. Salter*, 8 Paige 473; *Lattimore v. Harsen*, 14 Johns. 329.

Again, the complainants say that if the time for performance of a written contract may be extended or enlarged by parol, some consideration must be shown therefor before the court will enforce such parol contract. The proposition thus stated is supported by the authorities. *Parker v. Jameson*, 5 Stew. Eq. 222; *French v. Griffin*, 3 C. E. Gr. 279, 281.

But a court of equity will sometimes prevent parties from disregarding their promises, even when no consideration has accrued to them upon the making of such promise. If a party asking the aid of the court waive strict performance of his contract and make promises to the defendant upon which the latter has acted and altered his position, and it should appear to the court to work a hardship to the defendant to allow the complainant to withdraw his waiver, a court of equity always applies the doctrine of estoppel.

In such case, although no consideration or benefit accrues to the person making the promise, he is the author or promoter of the very condition of affairs which stands in his way; and when this plainly appears, it is most equitable that the court should say that they shall so stand. *Martin v. Righter*, 2 Stock. 510; *Church v. Florence Iron Works*, 16 Vr. 133; *Phillipsburgh Bank v. Fulmer*, 2 Vr. 55; *King v. Morford*, *supra*; *Huffman v. Hummer*, 3 C. E. Gr. 83, 90; *Stryker v. Vanderbilt*, *supra*; *Miller v. Chetwood*, 1 Gr. Ch. 208; *Cox v. Bennett*, 1 Gr. 165; *Lee v. Kirkpatrick*, 1 McCart. 264, 267; *Continental National Bank v. National Bank Com.*, 50 N. Y. 575; *Garrison v. Garrison*, 5 Dutch. 153. *The bill should be dismissed with costs.*¹

¹ Compare: *Abbott v. Investment Co.*, L. R. 3 Q B. 123; *Sharpe v. Arnot*, 51 Cal. 188; *Auffmordt v. Stephens*, 46 Conn. 412; *Beeson v. Savage*, 130 Ill. 352; *Redman v. Deputy*, 26 Ind. 338; *Faxon v. Faxon*, 28 Mich. 159; *McNew v. Booth*, 42 Mo. 189; *Dodge v. Crandall*, 30 N. Y. 294; *Union Co. v. Bonnell*, 35 Ohio St. 365; *Montague v. Meadows*, 21 Tex. Civ. 256; *Goodall v. Boardman*, 53 Vt. 92. — Ed.

PHILADELPHIA AND READING R. R. CO.'S APPEAL.

SUPREME COURT, PENNSYLVANIA, 1882.

[4 Am. & Eng. R. R. Cas. 118.¹]

BILL IN EQUITY.

The following was the form of the bonds proposed : —

PHILADELPHIA AND READING RAILROAD CO.
DEFERRED INCOME BONDS.

Total issue, 34,300,000.

This is to certify that _____ of
entitled to _____ dollars
of the Deferred Income Bonds of the Philadelphia and Reading R. R. Co. secured upon the property of the company. Transferable only upon the books of the company in person or by attorney duly authorized and on surrender of this certificate.

This certificate is one of an issue of 34,300,000 all of which issue are unredeemable and are entitled to interest up to six per cent only after a dividend of six per cent in each year shall have been paid on the common stock of the said company.

Witness, &c.

PARSONS, J. We are in no doubt as to the power of the Philadelphia and Reading R. R. to issue the deferred income bonds described in this bill. A stockholder who advances \$15 receives a bond for \$50. The contract is not usurious. *Non constat* that the company will ever pay anything to this class of bondholders. They more nearly resemble a perpetual loan with the interest indefinitely postponed. It is urged, however, that the transaction is not a borrowing of money within the implied powers of the company; that the word borrow as applied to commercial transactions involves an obligation to return the sum or thing borrowed. But it is not limited to this sense. While the borrowing of money is usually accompanied with a contract for the return of the principal at a stated time it is not always or necessarily so. The object of loaning money is to obtain a return in the way of interest. Is it any less so when the contract is perpetual and the loan unredeemable? The equivalent is paid annually in the shape of interest. I see no legal objection. Such transactions are common in England and not unknown in this country.

*The decree is affirmed and the appeal is dismissed at the costs of the appellants.*²

¹ This case is abridged. — Ed.

² Compare: *Cocoran v. Canal Co.*, 1 M. C. A. 358; *Hancock v. Peoria R. R.* 9 Fed. 737; *Montgomery v. R. R.*, 59 Ala. 139; *R. R. v. Exp. Co.*, 81 Ill. 534;

STRODE v. PARKER.

CHANCERY, 1694.

[2 Vern. 315.]

THE bill being to foreclose a mortgage, the interest by the deed was to be £5 per cent per annum and made payable half-yearly, and if not paid by the space of two months after the time of payment, then to pay after the rate of £5 10s. per cent per annum for increase of interest, the interest being run greatly in arrear; the question was, after what rate the interest should be computed upon the redemption of the mortgage.

The court decreed interest to be computed at the rate of £5 per cent per annum only, and took a difference where the interest was reserved at £6 per cent but to be reduced to £5 per cent if paid half-yearly; there if the party will have the benefit of lowering or reducing the interest, he must comply with the times of payment; and so decreed in the Lord Halifax's Case; but where the interest is to be increased, if not paid at the day, that is but in the nature of a penalty and relievable in equity.

Quære tamen, for the agreement of the parties seems to be the same in either case, and whether interest is to be reduced upon compliance with the times of payment, or to be advanced in default thereof, seems only to be a difference in the expressing one and the same thing.¹

POTTER v. EDWARDS.

CHANCERY, 1856.

[26 L. J. Ch. 468.]

KINDERSLEY, V. C. It does not appear to me that there is any contradistinction of the statements made by the defendant respecting the facts of this case. They are distinctly set forth in the answer, and supported by affidavit. The intention of the parties, therefore, seems to have been that £700 only was to be advanced, although the mortgage was to be a security for £1,000. The security appeared, and with justice, to be of a questionable character, and the defendant in

Jesspu v. Bridge, 11 Ia. 562; *Straus v. Seligman Co.*, 164 Mass. 130; *Garrett v. May*, 19 Md. 177; *Navigation Co. v. Central R. R.*, 34 N. J. Eq. 88; *Day v. Ogdensburg R. R.*, 10 N. Y. 129. — Ed.

¹ Compare: *Nichols v. Maynard*, 3 Atk. 519; *Boncefous v. Rybot*, 3 Burr. 1374; *Sterne v. Beck*, 1 De G. J. & S. 600; *Wallingford v. Soc.*, 5 A. C. 685; *Howard v. Western R. R.*, 94 U. S. 463; *Parker v. Oliver*, 106 Ala. 549; *Goodyear Co. v. Selz*, 157 Ill. 186; *Jones v. Schulzmeyer*, 39 Ind. 119; *Schooley v. Romain*, 31 Md. 574; *Meyer v. Meyer*, 105 Mo. 511; *Valentine v. Van Wagner*, 37 Barb. 60; *Youle v. Richards*, 1 N. J. Eq. 534. — Ed.

fact agreed to lend no more than £700 upon having a mortgage for £1,000, in consideration of the risk and hazard attending the transaction. The plaintiff, however, thinks it consistent with justice now to say, "We will tender you £700, and if you refuse it we will stop the interest and prove that no more than £700 was actually paid." The court has nothing to do with the honesty of this proceeding, but only to decide whether the plaintiff can succeed in his contention. It has been said that it would be contrary to the Statute of Frauds to allow parol evidence to contradict the plaintiff's case, but it appears to me just the contrary, for it is the plaintiff who is seeking to introduce parol evidence to vary the written instrument. The deed appears to me to be exactly what the parties intended it to be, that is, a security for £1,000 upon having an advance of £700. It is true that, in an ordinary case, where there is a mortgage for £1,000, and it is proved that £700 only has been advanced, the court will only allow it to stand for £700, but in this case there is uncontradicted evidence of an arrangement to a different effect. I was much struck with the fact, that the gentleman who prepared the mortgage-deed was not informed of the agreement between the parties, but there does not appear to have been any fraud intended in this respect. It would have been better if the information had been given because then no attempt would have been made by the plaintiff to set up his present case. My opinion is, that the plaintiff can only be allowed to redeem upon payment of the full sum of £1,000, and the tender consequently must go for nothing. But if I had come to a different conclusion, I certainly should not have stopped the interest on account of the tender.

The decree will be in the usual terms.¹

GORDON v. GRAHAM.

CHANCERY, 1716.

[2 *Eq. Cas. Abr.* 598.]

See 150

A. MORTGAGES to B. for a Term of Years, to secure a Sum of Money already lent to A. as also such other Sums as should hereafter be lent or advanced to him. A. makes a second mortgage to C. for a certain Sum, with Notice of the first Mortgage; and then the first Mortgagee, having Notice of the second Mortgage, lends a further Sum, &c. PER COWPER, LORD C. The second Mortgagee shall not redeem the first Mortgage, without paying as well the Money lent after, as that lent

¹ Compare: *Discount Co. v. Glegg*, 22 Ch. D. 549; *Wallingford v. Society*, 5 A. C. 685; *Donelson v. Posey*, 13 Ala. 752; *Moore v. Calkins*, 95 Cal. 435; *Footte v. Sprague*, 13 Kans. 155; *Richardson v. Barrick*, 16 Ia. 407; *Succession of Hickman*, 13 La. Ann. 364; *Norton v. Pattee*, 68 N. Y. 144; *Campbell v. Tompkins*, 32 N. J. Eq. 170; *Ruffer v. Putnam*, 12 Gratt. 591; *Hitchcock v. Merritt*, 15 Wis. 522. — Ed.

before the second Mortgage was made ; for it was the Folly of the Second Mortgagee, with Notice, to take such Security. But upon the Importunity of the Counsel, it was ordered,¹ that the *Master* should report what Money was lent by the first Mortgagee after he had Notice of the second Mortgage.

HOPKINSON AND ANOTHER v. ROLT.

HOUSE OF LORDS, 1861. .

[9 *House of Lords*, 514.]

THE LORD CHANCELLOR (LORD CAMPBELL). My Lords, this appeal raises a question of great importance to bankers, and to the mercantile interests of the country.

Independently of any particular agreement between these parties, either express or to be implied from their dealings, beyond what is to be found in the written documents, I think the question is accurately as well as tersely stated by Lord Chancellor Chelmsford in the judgment appealed against, "A prior mortgage for present and future advances ; a subsequent mortgage of the same description ; each mortgagee has notice of the other's deeds ; advances are made by the prior mortgagee after the date of the subsequent mortgage, and with full knowledge of it ; is the prior mortgagee entitled to priority for these advances over the antecedent advance made by the subsequent mortgagee?"

The supposed decision of Lord Chancellor Cowper in *Gordon v. Graham*, is relied upon by the appellants as a conclusive authority in their favor. But the report of the case in both books is evidently from the same note-taker ; and, as it appears in both books, it is very meagre, and in some material points certainly incorrect. When the registrar's book is examined, and the bill and answers and directions are considered, the facts of the case are found to be exceedingly complicated ; and I must say, that I do not think that the facts which were there actually alleged and proved, are by any means equivalent to those which raise the question before us.

I must say that the doctrine seems to me to be contrary to principle. Although the mortgagor has parted with the legal interest in the hereditaments mortgaged, he remains the equitable owner of all his interest

¹ Compare : *Collet v. De Goe*, 8 Tate, 65 ; *Wilmot v. Pike*, 5 Hare, 14 ; *Jones v. Indemnity Co.*, 101 U. S. 622 ; *Brewster v. Clainfitt*, 33 Ark. 72 ; *Hubbard v. Savage*, 8 Conn. 215 ; *Ladue v. R. R.*, 13 Mich. 380 ; *Re Young's Estate*, 3 Ind. Ch. 461 ; *Doyle v. White*, 26 Me. 341 ; *Bank v. Cunningham*, 24 Pick. 270 ; *Madigan v. Mead*, 31 Minn. 94 ; *Shores v. Dougherty*, 65 Wis. 153. — Ed.

² This case is abridged. — Ed.

not transferred beneficially to the mortgagee, and he may still deal with his property in any way consistent with the rights of the mortgagee. How is the first mortgagee injured by the second mortgage being executed, although the first mortgagee having notice of the mortgage, the second mortgagee should be preferred to him as to subsequent advances. The first mortgagee is secure as to past advances, and he is not under any obligation to make any further advances. He has only to hold his hand when asked for a further loan. Knowing the extent of the second mortgage, he may calculate that the hereditaments mortgaged are an ample security to the mortgagees; and if he doubts this, he closes his account with the mortgagor, and looks out for a better security. The benefit of the first mortgage is only lessened by the amount of any interest which the mortgagor afterwards conveys to another, consistent with the rights of the first mortgagee. Thus far the mortgagor is entitled to do what he pleases with his own. The consequence certainly is, that after executing such a mortgage as we are considering, the mortgagor, by executing another such mortgage, and giving notice of it to the first mortgagee, may at any time give a preference to the second mortgagee as to subsequent advances, and, as to such advances, reduce the first mortgagee to the rank of *puisne* encumbrancer. But the first mortgagee will have no reason to complain, knowing that this is his true position, if he chooses voluntarily to make further advances, to the mortgagor. The second mortgagee cannot be charged with any fraud upon the first mortgagee in making the advances, with notice of the first mortgage; for, by the hypothesis each has notice of the security of the other, and the first mortgagee is left in full possession of his option to make or to refuse further advances as he may deem it prudent. The hardship upon bankers from this view of the subject at once vanishes when we consider that the security of the first mortgage is not impaired without notice of a second, and that when this notice comes, the bankers have only to consider (as they do as often as they discount a bill of exchange), what is the credit of their customer, and whether the proposed transaction is likely to lead to profit or to loss. *Appeal dismissed.*¹

¹ Compare: *Young v. Young*, L. R. 3 Eq. 801; *Bradford Co. v. Briggs*, 12 App. Cas. 29; *Freeman v. Laing*, 1899, 2 Ch. 355; *Shiras v. Craig*, 7 Cranch, 34; *Re Haake*, 2 Sawy. 23; *Takia v. Demantine*, 77 Cal. 383; *Boswell v. Goodwin*, 31 Conn. 74; *Frye v. Bank*, 11 Ill. 367; *Bruekmeyer v. Browneller*, 55 Ind. 487; *Nelson v. Boyce*, 7 J. J. Marsh. 401; *Wilson v. Russell*, 13 Md. 494; *Ladue v. Detroit Co.*, 13 Mich. 380; *Ward v. Cooke*, 17 N. J. Eq. 93; *Farr v. Nichols*, 132 N. Y. 327; *Spader v. Lawler*, 17 Ohio, 371; *Banks' Appeal*, 36 Pa. 170; *McDaniels v. Colvin*, 16 Vt. 300. — ED.

ACKERMAN v. HUNSICKER.

COURT OF APPEALS, NEW YORK, 1881.

[85 N. Y. 46.]

ANDREWS, J. The mortgage from Levi, to the plaintiff, was given to secure the mortgagee, for any indorsements he had made, or should thereafter make, for the mortgagor, or the firm of Levi & Miller, to the amount of \$6,000. It was dated May 2, 1874, and was recorded May 3, 1874. The first indorsement was made May 7, 1874, and the last October 16, 1874. The plaintiff has been compelled to pay the indorsed paper, and has advanced for that purpose the sum of nearly \$5,000, over and above all payments made by the mortgagor. This action is brought to foreclose the mortgage, and the only controversy relates to the priority of lien as between the mortgagee and judgment creditors of the mortgagor, whose judgments were obtained subsequent to the mortgage, but prior to the indorsement by the plaintiff, of some of the notes, which enter into and form a part of the mortgage debt.

The question is whether the mortgage is a paramount lien to the judgments as to that part of the mortgage debt arising out of indorsements made after the judgments were docketed. It is not claimed that the plaintiff had actual notice of the judgments when he indorsed the paper, and it is found by the referee that he never had personal notice or knowledge, or any notice of their existence, until after all the indorsements had been made. The judgments were docketed in the county where the mortgaged premises were situated. If the docketing of the judgments was constructive notice to the plaintiff of their existence, then he had notice of the judgments; otherwise he had none.

There is no question as to the validity of mortgages to secure future advances or liabilities. They have become a recognized form of security. Their frequent use has grown out of the necessities of trade, and their convenience in the transactions of business. They enable parties to provide for continuous dealings, the nature or extent of which may not be known or anticipated at the time, and they avoid the expense and inconvenience of executing a new security, on each new transaction. It is well known that such mortgages are constantly taken by banks, and bankers, as security for final balances, and banking facilities are extended, and daily credits given, in reliance upon them. Mortgages for future advances have sometimes been regarded with jealousy, but their validity is now fully recognized and established. (*Bank of Utica v. Finch*, 3 Barb. Ch. 294; *Truscott v. King*, 6 N. Y. 147; *Robinson v. Williams*, 22 id. 380; *Shirras v. Caig*, 7 Cranch, 34; *Lawrence v. Tucker*, 23 How. [U. S.] 14; *Leeds v. Cameron*, 3 Sumn. 492.)

There can be no doubt, therefore, that the mortgage in this case, as between the parties to it, is a valid security for the plaintiff's debt. It

¹ This case is abridged. — Ed.

*as bet.
parties*

is equally clear that to prefer an intervening encumbrance over the claim of the plaintiff, would violate the understanding of the parties to the mortgage, at the time it was executed, for the plain intention was, that the interest of the mortgagor in the land, as it existed when the mortgage was given, should be bound as security for all liabilities which the plaintiff might incur as indorser, upon the faith of the mortgage. It could not have been intended that the plaintiff should be deprived of any part of the security of the mortgage for any part of the indorsed paper. It would have been a clear breach of good faith on the part of the mortgagor, if he had, without notice to the mortgagee, voluntarily encumbered the land by liens having priority of the mortgage, and then applied to the plaintiff for, and procured further indorsements.

The doctrine that a party who takes a mortgage to secure further optional advances, upon recording his mortgage is protected against intervening liens, for advances made upon the faith and within the limits of the security, until he has notice of such intervening lien, and that the recording of the subsequent lien is not constructive notice to him, has, we think, been generally accepted as the law of the State, at least since the decision in *Truscott v. King*. It would not be wise, under the circumstances, now to adopt the opposite view, even though we should regard it as better supported by reason. It seems to us, however, that the doctrine which we have affirmed in this case is most consistent with equity, and establishes a rule which is reasonable, and easy of application. The opposite rule imposes the burden of notice and vigilance upon the wrong person. The party taking the subsequent security may protect himself by notice, and as is said by Mr. Jarman in his notes to Bytherwood's Conveyancing: "No person ought to accept a security subject to a mortgage authorizing future advances, without treating it as an actual advancement to that extent."

These views lead to a reversal of the order of the General Term and an affirmance of the judgment entered upon the report of the referee.

All concur.

*Order reversed, and judgment affirmed.*¹

WEST v. WILLIAMS.

CHANCERY, 1898.

[1898, 1 Ch. 488.2]

KEKEWICH, J. It was necessarily admitted on behalf of the plaintiff that his mortgage of December 24, 1895, must be postponed

¹ Compare: *Hendon v. Morris*, 110 Ala. 106; *Jarratt v. McDaniel*, 32 Ark. 598; *Collins v. Carlisle*, 13 Ill. 254; *Banking Co. v. Leonard*, 90 Ky. 106; *Chaffee v. Whitfield*, 40 La. Ann. 631; *Wilson v. Russell*, 13 Md. 494; *Witzneski v. Werman*, 57 Miss. 841; *Dummer v. Smedley*, 110 Mich. 466; *Bell v. Fleming*, 12 N. J. Eq. 13; *Todd v. Outlaw*, 99 N. C. 235; *Hendrix v. Core*, 8 Ore. 406; *McCarthy v. Chalfant*, 15 W. Va. 514; *McDaniels v. Colvin*, 60 Vt. 300. — Ed.

² Only one point is printed. — Ed.

to that of the defendants, Philip Addison Williams and John William Williams, of April 2, 1896, as regards the sum of £2,297 then advanced by them, and such other sums (if any) as were advanced by them on the same security at a later date but before they received notice of the plaintiff's mortgage. It was contended that, as regards any sums advanced after the receipt of that notice, the plaintiff's mortgage has priority; and in support of this contention counsel relied on the authority of *Hopkinson v. Rolt*. There is much in the report of that case depending on the conduct of the respondent, the pleadings, and the supposed authority of *Gordon v. Graham*, which was then finally overruled; but the point really decided is briefly, but accurately, stated in the first branch of the head-note to the report, which runs as follows: "A first mortgagee, whose mortgage is taken to cover what is then due and also future advances (within a fixed amount), cannot claim the benefit of such advances in priority over a second mortgagee, of whose mortgage he had notice at the time of its execution, and before he made these new advances." The doctrine there laid down not merely has never been questioned — which, of course, it could not be — but has been largely applied to cases of a similar character. Neither in *Hopkinson v. Rolt*, nor in any of the cases which have followed it, has there been, so far as I am aware, any obligation on the first mortgagee (whose position, by reason of the omission of the plaintiff to give notice of his charge, is here filled by the defendants Williams) to make further advances; and in *Hopkinson v. Rolt* the mortgage was created in favor of bankers and to secure a current account. It seems to me that, if once you introduce the element of obligation to make further advances, the authority of *Hopkinson v. Rolt* is inapplicable; and that view is supported by more than one passage in the speeches of the Lord Chancellor (Lord Campbell) and Lord Chelmsford in the House of Lords. I do not myself see any substantial difference for this purpose between a present advance and a covenant to make certain advances at a future time on which the covenantee may maintain an action not to be answered by a plea that in the meantime the mortgagor has created another charge on the mortgaged premises.

The plaintiff therefore is entitled to no relief against the (first) mortgagees of April 2, 1896, or the trustees of the settlement and there must be judgment for them with costs.¹

¹ Compare: *Lovelace v. Webb*, 62 Ala. 271; *Balch v. Chaffe*, 47 P. H. Rep. 327; *Simpson v. Robert*, 35 Ga. 180; *Demeza v. Geneeres*, 22 La. Ann. 285; *Goddard v. Sawyer*, 9 Allen, 78; *Weed v. Baker*, 35 N. H. 386; *Kramer v. Bank*, 15 Ohio, 253; *Maroney's Appeal*, 24 Pa. St. 372. — Ed.

DIVISION II.—THEIR INTERRELATION.

SECTION I.—INDEPENDENCE.

AYLET *v.* HILL.

CHANCERY, 1779.

[2 *Dick.* 551.]

A MORTGAGEE forecloses, and, having a bond as a collateral security, brings an action on the bond.

Motion to stay proceedings at law on the bond.

The LORD CHANCELLOR held that the mortgagee might proceed at law on his bond, notwithstanding he had obtained a decree of foreclosure, and denied the motion.¹

NEWBOLD *v.* NEWBOLD.

CHANCERY, DELAWARE, 1825.

[1 *Del. Ch.* 310.²]

PETITION FOR AN INJUNCTION. — This was a petition of John Newbold for an injunction, accompanied by an affidavit of the petitioner, setting forth, as the ground of the petition, the following facts, viz :

The petitioner, on the 27th of August, 1823, executed a mortgage of certain real estate, in Delaware County, Pennsylvania, to the Farmers' and Mechanics' Bank in the City of Philadelphia, one of the defendants, to secure the debt of \$15,400, payable with interest, on or before the twenty-seventh day of August, 1825. Accompanying the mortgage was the petitioner's bond for the same debt, with a warrant of attorney for the confession of judgment. The bond and mortgage were afterwards assigned by the Bank to the other defendants, Michael Newbold, Thomas Newbold and William Black, Jr., executors of Thomas Newbold, deceased, by whom said securities are now held.

The petition then set forth that the defendants, Michael Newbold,

¹ Compare: *Burrell v. Martin*, Doug. 417; *Cullum v. Emanuel*, 1 Ala. 23; *Very v. Walkins*, 18 Ark. 456; *Juchter v. Bochor*, 63 Ga. 71; *Brown v. Cascadell*, 43 Ia. 103; *Stevens v. Dufour*, 1 Blackf. (Ind.) 387; *Rogers v. Meyers*, 68 Ill. 92; *Lichty v. McMartin*, 11 Kans. 565; *Croghan v. Conrad*, 11 Martin, 555; *Marston v. Marston*, 45 Me. 412; *Draper v. Mann*, 117 Mass. 439; *Watson v. Hawkins*, 60 Mo. 550; *Shermer v. Merrill*, 33 Mich. 284; *Scott v. Funk*, 53 Barb. 533; *Dey v. Waters*, 7 N. J. 335; *Ellis v. Husey*, 66 N. C. 501; *Spence v. Insurance Co.*, 40 Ohio St. 517; *Wyman v. Kelly*, 1 Nev. 129; *Frank v. Pickle*, 2 Wash. T. 55. — ED.

² Only one point is printed. — ED.

Thomas Newbold and William Black, Jr., executors of Thomas Newbold, dec'd, had caused judgments to be entered upon the petitioner's aforesaid bond in the Supreme Court of the State of Delaware for New Castle County; that upon said judgment a writ of *fiery facias* had been issued and the same had been levied upon the before-mentioned real estate of the petitioner situated in New Castle County, notwithstanding the said executors held for the same debt a mortgage on the tract of land in Delaware County, in the State of Pennsylvania, of a value far more than sufficient, at a sheriff's sale, to discharge the said debt after paying the prior liens upon it, which tract of land the said executors then had in their actual possession and were in receipt of its profits.

The CHANCELLOR refused to award the writ, and assigned the following as his reasons:

Upon the best consideration which I can give to the subject, I do not think that upon the case made in the petition the writ of injunction should be ordered.

It seems to me to be clearly and reasonably settled that a mortgagee may use all the remedies upon a bond and mortgage which the law affords, at the same time, and consequently any one of them which he prefers; but that he shall not take a double satisfaction for the debt. In *Booth v. Booth*, 2 Atk. 343, Lord Hardwicke says, "though the defendant is foreclosing the equity of redemption here, yet he is not precluded from bringing an ejectment at law at the same time, unless there is something very particular to take it out of the common case." And Lord Redesdale, in 1 Sch. & Lef. 176, states the general rule to be, that "where a party is suing in this court he shall not be allowed to sue at law for the same debt. But the case of a mortgage is an exception to this rule; he has a right to proceed on his mortgage in equity, and on his bond at law at the same time." In the case before Lord Redesdale there was something "very particular," (as Lord Hardwicke said) which formed an exception to the general principle, but not applicable to the present question. And in 3 Johns. Ch. Rep. 331, Chancellor Kent says it seems to be generally admitted in the books, that the mortgagee may proceed at law on his bond or covenant at the same time that he is prosecuting his mortgage in chancery.

If the mortgagee may thus proceed, both at law and in equity, he certainly may have the fruit of both, or of either, so that he does not take a double satisfaction; and whether he proceeds at law on the bond and mortgage, or at law on the bond and in equity on the mortgage, the principle is the same. Here, the mortgagee is not proceeding on the mortgage. In 1 Yeates R. 9, where a suit was brought on a bond which accompanied a mortgage, the court would not prevent the plaintiff from levying it on what land he pleased.

*Petition dismissed.*¹

¹ Compare: *Took v. Hartley*, 2 Bro. C. C. 125; *Bank v. Brewing Co.*, 74 Fed. 110; *Whitney v. Lumber Co.*, 89 Ala. 493; *Powell v. Palison*, 100 Cal. 236; *Belmont v.*

THAYER v. MANN.

SUPREME COURT, MASSACHUSETTS, 1837.

[19 Pick. 535.]

See page 458

PUTMAN, J., afterward drew up the opinion of the court. The tenant's title was expressly to be subject to the encumbrance of the mortgage of the demandant. And the jury have found that the notes, for the security of which this mortgage was given, have not been paid, and that there existed no substantial set-off thereto. But the tenant contends that the demandant cannot recover in this action, because the notes are barred by the Statute of Limitations, so that the demandant could not recover upon the notes, if he sued for the same in his own name. And the fact is so; all the notes are within the statute. Two of them are witnessed, but that circumstance would not enable the indorsee to sue in his own name; and the third note, which is not witnessed, could not be recovered even in the name of the promisee, unless he could repel the statute bar.

The demandant is the assignee of the first mortgage and of the notes. The tenant therefore contends that the demandant cannot be entitled to recover upon the mortgage, inasmuch as he could not enforce his claim upon the notes; and that a statute bar is to all intents equivalent to an actual payment of the debt or notes secured by the mortgage. That is the question to be decided. A reference to the condition contained in the mortgage, shows that it is to be and remain in full force until the debt shall be paid. The creditor has a double remedy, one upon his deed, to recover the land, another upon the note, to recover a judgment and execution for the debt; and it does not follow that he cannot recover on one, although there may be some technical objection or difficulty to his recovery upon the other. The debt remains although the Statute of Limitations may discharge the remedy upon the note.

Thus in 3 Esp. R. 81, *Spears v. Hartly*, it was held by Lord Eldon, that where a creditor obtains possession of goods on which he has a lien for a general balance, he may hold in virtue of his lien, although the Statute of Limitations has run against a part of his demand. The debt was not discharged by the statute; it was the remedy only which was affected.

If there were no reference in the condition to the notes, the case would seem too clear for argument; thus, if the condition were, that the mortgage should be void when the mortgagor or his executors, &c. should pay a certain sum of money, with lawful interest, it would

Cornerr, 48 Conn. 388; Waller v. Tate, 4 B. Mon. 529; Kearns v. Lloyd, 52 Ill. 113; Tice v. Anin, 2 Johns. Ch. 185; Hardware Co. v. Brokaw, 7 Neb. 405; Momo's Ex'ors v. M. Conaughy's Ex'ors, 1 Yeates, 9; Simpson v. Simpson, 93 N. C. 373; Stephens v. Iron Co., 58 Tenn. 71. — Ed.

be in that respect like a Welsh mortgage, and nothing short of payment would defeat the title of the mortgagee. Now the reference to the notes recognizes the debt. The mortgage is given to secure the payment. It is to be discharged and rendered of no effect when the debt is paid. In *Toplis v. Baker*, 2 Cox, 123, it was said by the court, that "if the collateral security had been a note of hand instead of a bond, the Statute of Limitations would run against the note and leave the mortgage as it was."

In the case at bar the question, whether or not the debt has been paid, has been submitted to the jury, who have decided in the negative. The condition upon which the mortgage was given not having been performed, the court is of opinion that the demandant have judgment for possession as upon a mortgage.¹

CLINTON COUNTY v. COX ET AL.

SUPREME COURT, IOWA, 1873.

[37 Ia. 570.]

BECK, Ch. J. The facts upon which the only question involved in this case arises are these: The deed of trust and notes held by Butterfield were executed more than ten years prior to the commencement of the suit, but Cox, who executed them, has been a non-resident of the State for a sufficient time to take an action against him upon the notes out of the operation of the Statute of Limitations. Rev. § 2745. A deed of trust to secure the payment of money is enforced by foreclosure as a mortgage. Rev. § 3673. Counsel agree that, in this case, it is to be considered as a mortgage. Is Butterfield's remedy by foreclosure against the land barred by the statute? This is the sole question presented by the case for our decision.

Under the laws of this State a mortgage conveys no interest in, or title to, lands, but is simply a lien thereon for the purpose of securing the indebtedness which is its foundation. It is an incident — a security, in the nature of a lien — of the debt. It survives until the debt be paid or discharged, or the mortgage is released. It is a convey bearing a lien for the protection of the debt, and as long as that exists it is not relieved of the duty of protection or rendered ineffective for that purpose. When the debt is discharged or, by operation of law, may no longer be enforced, its functions terminate, and not before.

¹ Compare: *Spears v. Hartly*, 3 Esp. 81; *Hughes v. Edwards*, 9 Wheat. 489; *Hough v. Bailey*, 32 Conn. 288; *Jordan v. Sayre*, 17 Fla. 607; *Elkins v. Edwards*, 8 Ga. 325; *Crawford v. Hazelrigg*, 117 Ind. 63; *Trust Co. v. Winn*, 4 Md. Ch. 253; *Norton v. Palmer*, 142 Mass. 233; *Knight v. McKenny*, 84 Me. 107; *Hulbert v. Clark*, 128 N. Y. 295; *Overman v. Jackson*, 104 N. C. 4; *Dearmann v. Trimmer*, 26 S. C. 206; *Goldfrank v. Young*, 64 Tex. 432; *Richmond v. Aiken*, 25 Vt. 324; *Kennedy v. Wright*, 21 Wis. 340. — Ed.

Gower v. Winchester, 33 Iowa, 303; Burton v. Hintrager, 18 id. 348; State v. Lake, 17 id. 215; Vannice v. Bergen, 16 id. 555; Crow, McCreery & Co. v. Vance, 4 id. 435; Hendershott v. Ping, 24 id. 134; Packard v. Kingman, 11 id. 219.

These principles determine the question before us, for, unless it appears that the debt is discharged, or is, under the law, no longer capable of being enforced, the deed of trust stands as a security for its payment. The non-residence of the debtor, Cox, arrested the operation of the Statute of Limitations, and the remedy upon the indebtedness still exists. The lien of the deed of trust may be enforced to satisfy the debt.

These doctrines are so well supported by the authorities cited, and the conclusion we reach is so plainly deducible therefrom, as to forbid discussion. We have held, applying the same principles, that an admission of a debt and a new promise to pay, which suspends the operation of the Statute of Limitations, keeps alive the lien of a mortgage given to secure the indebtedness. Mahon v. Cooley *et al.*, 36 Iowa, 479. The case is not distinguishable in principle from the one before us. In each the debt would have been barred but for the suspension of the operation of the statute, in the one case by a new promise, in the other by non-residence.

The argument of appellee's counsel, based upon the fact that Butterfield could have brought an action to foreclose the mortgage within the ten years, upon service of process by publication, notwithstanding the non-residence of Cox, is answered by the case just cited. In that case an action could have been brought before the time fixed by the statute, ten years, expired. Counsel contend that as ten years have run in which an action could have been brought, it is now limited. But the law does not so provide, and, in the case cited, we have, in effect, held otherwise. But in truth, the time of limitation provided for by the statute has not expired, for the period of the non-residence of Cox is expressly taken therefrom. This is a sufficient answer to the argument.

The conclusion we reach, it is thought by appellee's counsel, will, in this and other like cases, work hardship. Lands may be purchased upon which old, unsatisfied mortgages may rest, under the supposition that they are satisfied or barred by the statute, and may be subjected to such liens in the hands of the purchasers. But the hardships in such cases result not from the law, but from the parties acting under a mistaken notion of their rights, and relying upon presumptions and protection not recognized by the law. Against hardships thus arising courts can extend no protection.

The judgment of the District Court upon the demurrer is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

*Reversed.*¹

¹ Compare: Lord v. Morris, 18 Cal. 482; Schefferstein v. Allison, 123 Ill. 662; Burton v. Hintrager, 18 Ia. 348; Hubbard v. Insurance Co., 25 Kans. 172; Henry v. Mining Co., 1 Nev. 619; Kyger v. Ryley, 2 Neb. 20; Kerr v. Lydecker, 51 Ohio St. 254; Duty v. Graham, 12 Tex. 427. — Ed.

WARING v. SMITH.

CHANCERY, NEW YORK, 1847.

[2 Barb. Ch. 119.¹]

THE CHANCELLOR. The case, therefore, which is presented by the bill, is simply this: The holder of a bond and mortgage, without authority from either of the mortgagors, and without the knowledge of one of them, alters the condition of such bond and mortgage, in two very essential particulars, to their disadvantage; and after the one who is informed of the fact had declined to ratify the alteration, by a re-acknowledgment, the mortgagee passes off the bond and mortgage as valid and genuine securities, to secure the repayment of a loan of money to himself. And the question now to be considered is this: can the assignees of the person who has been guilty of this fraud, or any other person claiming title to the bond and mortgage under him, or them, as the assignee thereof, enforce the collection of the mortgage, in a court of equity, against the mortgaged premises, in the hands of the mortgagors, or in the hands of persons claiming title under such mortgagors, or either of them?

It was formerly held, that the alteration of a bond, or other sealed instrument, in a material part, even by a stranger, without the consent of the party whose rights were affected by such alteration, avoided the deed. (Pigott's case, 11 Coke's Rep. 27.) The modern and more sensible rule, however, is, that such an alteration, if made by a party claiming to recover on such bond or instrument, or by any person under whom he claims, renders the deed void; but that an alteration by a stranger, without the privity or consent of the party interested, will not render the deed void, where the contents of the same, as it originally existed, can be ascertained. (Rees v. Overbaugh, 6 Cowen's Rep. 746; Mathis v. Mathis, 3 Dev. & Bat. Rep. 60; Henfree v. Bromley, 6 East, 309.) I apprehend, however, that the burden of proof in such cases, is cast upon the party seeking to recover upon the deed, to show that the alteration was not made by him, or by those under whom he claims, nor with his or their privity or consent.

A distinction is made between deeds which operate to convey the title to property, and those which merely give a right of action. For, where the legal title to real estate passes to the grantee by the execution and delivery of a deed, a fraudulent alteration of the deed, by such grantee, will not have the effect to re-vest the title in the grantor, in cases where the Statute of Frauds requires a written conveyance to transfer the title. (Doe, *ex dem.* Berkley v. Archbishop of York, 6 East's Rep. 86; Mitler v. Mainwaring, Cro. Car. 397; Maginnis v. McCulloch, Gilb. Eq. Rep. 235; Morgan v. Elam, 4 Yerg. Rep. 375; Doe, *ex dem.* Beauland v. Hirst, 3 Stark. Rep. 60; Lewis v. Payn, 8

¹ This case is abridged. — ED.

Cowen's Rep. 71.) In this class of cases it is held, that the title to the estate, which was vested in the grantee by a genuine and valid conveyance, remains in the grantee, although he destroys or makes void the deed itself, by a forgery, or by a voluntary cancelment of the conveyance which created that title. But the deed itself is avoided thereby; so that the grantee cannot recover upon the covenants therein, nor sustain any suit founded upon the deed as an existing and valid instrument.

The case is much stronger against the complainant in this State, where the mortgagor is, for most purposes, considered the legal as well as the equitable owner of the mortgaged premises, previous to foreclosure; and where a discharge of the debt leaves the legal title to the premises in the mortgagor, or those who have derived title thereto under him, as if no mortgage had ever been given. Before the adoption of the Revised Statutes, it was settled by the courts of this State, that the mortgagor was to be considered as the real owner of the fee, of the lands mortgaged, except for the mere purposes of protecting the mortgagee as the holder of a security thereon for the payment of his debt. (See *Runyan v. Mersereau*, 11 John. Rep. 534.) And the Revised Statutes have restricted the legal rights of the mortgagee still further, by depriving him of the power to bring a suit to recover the possession of the mortgaged premises, before a foreclosure. The only right he now has in the land itself, is to take possession thereof, with the assent of the mortgagor, after the debt has become due and payable, and to retain such possession until the debt is paid. The mortgage then is here nothing but a chose in action; or a mere lien or security upon the mortgaged premises, as an incident to the debt itself. And where the mortgagee has released or discharged his debt, by an improper and voluntary alteration or destruction of the bond and mortgage by which it is secured, he ought not to be permitted to sustain a suit, in any court, for the recovery of his debt, the basis of which suit must be the securities thus voluntarily destroyed or made void.

N. F. Waring, the mortgagee, who was guilty of the improper acts of altering this bond and mortgage, and of then passing them off to the insurance company, as good and available securities, certainly would not himself have had the right to come into this court to foreclose the mortgage. And his assignees sit in the seat of their assignor, and are not entitled to any relief, against these defendants, which the assignor himself could not have claimed.

*The decretal order of the Vice Chancellor, which is appealed from, is therefore right, and it must be affirmed with costs.*¹

¹ Compare: *Harrison v. Owen*, 1 Ark. 519; *Mills v. Hamilton*, 49 Ia. 111; *Mayer v. Lamphon*, 86 Ill. 513; *Brooks v. Allen*, 62 Ind. 104; *Russell v. Reed*, 36 Minn. 376; *Whitney v. Frye*, 10 Mo. 349; *Smith v. Mace*, 44 N. H. 553; *Robertson v. Hay*, 1 Pa. 242; *Bigelow v. Stilphen*, 35 Vt. 521. — ED.

McKAY v. FUNK.

SUPREME COURT, IOWA, 1873.

[37 Ia. 662.]

BECK, Ch. J. I. The appellant claims that the District Court had not jurisdiction in the case to proceed to judgment either in the foreclosure of the mortgage or on the personal claim against the defendant, but should have stayed proceedings in each upon defendant's motion. The proceedings are of a double character and object: 1. To foreclose the mortgage and subject the lands to the lien thereof; 2. To recover judgment against defendant personally, which may be enforced, for the amount of the debt remaining unsatisfied after the sale of the lands upon the decree of foreclosure.

It has been determined by this court that the bankruptcy of the mortgagor does not defeat the jurisdiction of the State court to entertain a cause of foreclosure when the assignee has taken no steps to redeem from the mortgage, and the mortgagee has not filed a claim for the debt secured, in the bankrupt proceeding; acts which are necessary to give the Bankrupt Court jurisdiction over the mortgaged property. *Brown v. Gibbons, ante.*

Following this decision we hold that the District Court possessed jurisdiction to entertain the foreclosure proceeding, and by proper decree order the sale of the property, and the application of the proceeds to the payment of the mortgage debt. The decree to that extent is affirmed.

II. The other proceedings in this action looking to a personal judgment against defendant, inasmuch as they involved a matter — a personal debt against one adjudged a bankrupt — which was within the jurisdiction of the Bankrupt Court, ought, under section 21 of the Bankrupt Act, to have been stayed, and nothing further done therein after defendant's motion until the final determination of the question of the bankrupt's discharge. Doubtless it was esteemed by the court below that the order staying execution fully complied with the requirements of the section of the Bankrupt Act just cited; but it does not so appear to us. After the motion was filed nothing ought to have been done further than the entering of an order staying proceedings. But a judgment was rendered, which, however, was not to be enforced by execution until the further order of this court. The law was not followed, and the judgment against defendant personally was, therefore, erroneous, and must be reversed.

As it does not appear that specific objection on these grounds was made to this judgment in the court below, and as the decree of foreclosure is affirmed, the reversal will be without costs.

The defendant will pay all the costs of this appeal. The cause will be remanded for proper proceedings in harmony with this opinion.

*Affirmed as to the decree of foreclosure. Reversed as to the personal judgment against defendant.*¹

EXLEY v. BERRYHILL.

SUPREME COURT, MINNESOTA, 1887.

[37 Minn. 182.]

THE plaintiffs brought this action to obtain the cancellation of certain deeds and mortgages held by the defendants.

DICKENSON, J. Upon the allegations of the complaint the transaction of August, 1884, was not effectual to remove the taint of usury. The transaction appears to have consisted of a transfer or relinquishment from Berryhill to Mrs. Exley of the property which in his hands was, in equitable contemplation, security merely for the usurious debt, and the taking of mortgages anew upon the same property to secure the same debt, which was done at the instance of the defendant as a means of changing the form of the loan.

The foreclosure of the usurious mortgage by sale under the power does not prevent the granting of relief. *Jordan v. Humphrey*, 31 Minn. 495 (18 N. W. 450).

The point that the plaintiffs cannot maintain this action without offering to pay what may be still unpaid of the money actually received, with legal interest, has just been decided adversely to the appellant in the case of *Scott v. Austin*, 36 Minn. 460 (32 N. W. Rep. 864), the decision of which has been filed at the present term.

*We find no material error in the case, and the judgment is affirmed.*²

¹ Compare: *Ex parte Rumboll*, 6 Ch. App. 842; *Ex parte Hirst*, 11 Ch. D. 278; *Yeatman v. Savings Institution*, 95 U. S. 764; *Re Pittlekow*, 92 Fed. 901; *Flertus v. Merceaux*, 47 La. Ann. 237; *Champron v. Buckingham*, 165 Mass. 76; *Harvey v. Smith*, 179 Mass. 592; *Kezer v. Clifford*, 59 N. H. 308; *Childs v. Childs*, 10 Ohio St. 339. — ED.

² Only one point is printed.

³ Compare: *Ishenwood v. Dixon*, 5 Grant Ch. 314; *Bosanquet v. Dashwood*, Talbot, 38; *Hunt v. Acre*, 28 Ala. 580; *Breathwit v. Rogers*, 32 Ark. 758; *Dotterer v. Freeman*, 88 Ga. 479; *Stuphen v. Cushman*, 35 Ill. 186; *Jenkins v. Leavitt*, 25 Kans. 479; *Hart v. Goldsmith*, 1 Allen, 145; *Williams v. Fitzhugh*, 37 N. Y. 444; *Conover v. Hobart*, 24 N. J. Eq. 120; *Holladay v. Holladay*, 13 Ore. 523; *Bensley v. Hourier*, 42 Wis. 631. — ED.

STILLMAN v. LOONEY.

SUPREME COURT, TENNESSEE, 1866.

[3 Cold. 20.]

SHACKELFORD, J., delivered the opinion of the court.

This bill was filed on the chancery side of the Common Law and Chancery Court at Memphis, to foreclose a mortgage executed by the defendant, on three lots in the City of Memphis, which had been duly registered to secure the payment of two notes, of \$2,500 each, dated July 22, 1852, due in twelve and twenty-four months from date, payable at the Union Bank, indorsed by Stillman & Beach. The answer of the defendant and the proof, shows the consideration for which the notes were executed was Confederate Treasury notes. The CHANCELLOR dismissed the bill; from which the complainant has appealed.

It is a well-settled principle in executing contracts, if the consideration is illegal and against public policy, the court would not lend its active aid to enforce it. No rule of law is more clearly defined and settled than this, in the American and English Jurisprudence: 3 Head, 297 and 723; 6 Bing. 174; 10 Bing. 110. This court, held in the case of Overall v. Wright, deceased, at Nashville, December Term, 1865, in manuscript, that an agreement to credit a payment in Confederate Treasury Notes, for which Mr. Wurtz had given his receipt, and on the trial sought to have credited on the note, was no payment; that Confederate Treasury Notes were issued for an unlawful purpose, and in violation of the laws of the State, and Constitution of the United States, and that all contracts founded upon them, was illegal, and could not be enforced through the courts. In the case of Craig v. the State of Missouri, the Supreme Court of the United States held, a promissory note given for certificates issued at the Loan Office of Chariton, Missouri, payable to the State of Missouri, under the Act of the Legislature establishing Loan Offices, was void, 4 Peters, 410, the Act being in conflict with the Constitution of the United States.

In the case under consideration, the notes were issued by an unlawful confederation of States, whose declared purpose was to overthrow the Constitution. The enforcement of all such contracts is against public policy. The party seeking the aid of the court will be repelled. The defendant, not out of any favor to him, but because he is such, can allege and show the illegality of the contract. That being made apparent, the legal consequences follow.

*There is no error in the decree of the Chancellor, and the same is affirmed.*¹

¹ Compare: Whaley v. Norton, 1 Vern. 483; Robinson v. Bland 2 Burr. 1077; Plant v. Gunn, 2 Woods, 372; Schiele v. Pachs 41 Ala. 423; Patterson v. Dowses, 48 Cal. 369; Small v. Williams, 87 Ga. 681; Smith v. Steely, 80 Ia. 738; Hill v.

APPONAUG BLEACHING, DYEING, & PRINTING CO.
v. RAWSON ET AL.

SUPREME COURT, RHODE ISLAND, 1900.

[22 R. I. 123.]

BILL in equity to redeem property alleged to have been conveyed by a trust in the nature of a mortgage. The bill alleged that the complainant, being unable to pay its indebtedness in full, entered into an agreement with R., one of the respondents, for the purpose of preventing a sacrifice of its property and effecting a settlement with its creditors for 20 per cent, by which arrangement it was to convey all its property to R. in trust; that R. was to carry on the business and pay the creditors of A., so far as they would accept 20 per cent of their claims; and upon repayment to R. by A. of all moneys used to effect such settlement and the necessary expenses incurred, with interest on said amount and, the cost of all permanent improvements made on the property and the further sum of \$5,000 as payment for his services, R. agreed to reconvey all the property to A.; that A. conveyed all its property to R. by absolute deed and bill of sale, and R. executed an agreement, which was not recorded, to reconvey said property on said terms at the expiration of one year from the date of said agreement; that the value of said property was much greater than the amount necessary to pay 20 per cent of its indebtedness and the \$5,000 for services. The bill alleged that R. thereafter conveyed all said property to the X. corporation, which received the same with notice of said agreement. The bill averred an offer and readiness to pay R. the amount of money expended by him, but alleged a refusal by R. to furnish any information thereof. The bill asked for an accounting, and that the complainant be permitted to redeem the property in accordance with the agreement. Heard on demurrer to bill, and demurrer sustained.

PER CURIAM. We do not think that the transaction set out in the bill was a mortgage, as contended in behalf of the plaintiff, but that, the corporation being insolvent, it was rather a scheme on its part to enforce a settlement with its creditors on its own terms. As such it was clearly fraudulent and void as against creditors, and the complainant is therefore in no position to ask the intervention of the court.

The case of *Hudson v. White*, 17 R. I. 519, was not a case of a fraudulent conveyance, and the statement alleged to be a dictum was that one not a creditor and being neither grantee nor grantor could not

Blizzard, 70 Ind. 23; *Eystes v. Hatheway*, 50 Ill. 521; *Hyatt v. James*, 2 Bush, 463; *Atwood v. Foske*, 101 Mass. 363; *Meech v. Lee*, 82 Mich. 274; *Shoenes v. Lessaero*, 107 N. Y. 111; *Suirke v. Titus*, 32 N. J. Eq. 51; *James v. Roberts*, 10 Ohio St. 48; *Pearson v. Williams*, 111 Pa. St. 114; *Drake v. Alexander*, 86 Va. 206; *Ocenlo Co. v. Hall*, 47 Wis. 89. — ED.

raise that question as to such a conveyance. In the present case the grantor seeks to redeem from the grantee upon a secret trust which he claims operates as a mortgage.

*Demurrer sustained.*¹

¹ Compare: *Edwards v. Harvey*, 2 T. R. 587; *Crawford v. Neal*, 144 U. S. 585; *Morseman v. Werges*, 3 Fed. 328; *Shirk v. Williamson*, 50 Ark. 562; *Salmon v. Bennett*, 1 Conn. 525; *Estudillo v. Meyerstein*, 22 Cal. 717; *Judge v. Vogel*, 38 Mich. 569; *Harvey v. Varney*, 98 Mass. 110; *Larpard v. Sherwood*, 79 Mich. 520; *Bonesteel v. Sullivan*, 104 Pa. 9; *Stratton v. Putney*, 62 N. H. 577; *Bissell v. Beeson*, 47 N. J. Eq. 580; *Perry v. Hardeson*, 99 N. C. 21; *Clark v. Forbes*, 9 Neb. 76. — Ed.



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